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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Under the Twenty-first Amendment grant to the states of virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system, does a state have the power to enact legislation prohibiting a licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner?

2. Is the California licensed liquor importer designation statute within the province of the Sherman Act?

LIST OF PARTIES

In addition to the parties listed in the caption, there were also two intervenors in the Court below: Bohemian Distributing Company, a California corporation, and Wine

and Spirits Wholesalers of California,
a California corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondents.

PETITION FOR A WRIT OF CERTIROARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

Petitioner, Baxter Rice, Director, Department of Alcoholic Beverage Control of the State of California, respectfully prays that a writ of certiorari issue to review

the judgment and opinion of the Court of Appeal, Third Appellate District, State of California, entered in the proceedings on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980.

OPINION BELOW

The opinion of the Court of Appeal, Third Appellate District, of the State of California in the case of Norman Williams Company, et al. v. Rice, 108 Cal.App.3d 348 (1980); ptn. for hrg. den. Sept. 24, 1980, is printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeal, Third Appellate District, of the State of California was entered in an original proceeding before that Court on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980. This

petition for certiorari is filed within ninety (90) days after the case became final in the courts of California. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XXI.

Section 2.

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Sherman Act, 15 U.S.C.

Section 1.

"Every contract, combination in the form of trust or otherwise, or

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . ."

California Liquor Importer Designation Statute.

Statutes of 1979, Chapter 280, Section 1.

"Business and Professions Code Section 23672.

"A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such dis-

tilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

STATEMENT OF THE CASE

The federal questions sought to be reviewed in this case were raised initially in the California Court of Appeal, Third Appellate District, which, in this case, was a Court of first instance. Reference is made to the Petition for Writ of Mandate at pages 12 and 13; to the Points and Authorities in Support Thereof at pages 12 and 13; and to the Amended Petition for Writ of Mandate at pages 4, 12 and 13. Copies of these pages are annexed in the Appendix. The issues were discussed ex-

tensively by the parties in over hundreds of pages in subsequent Points and Authorities and in oral argument.

The Court of Appeal only passed on federal issues and its entire Opinion, commencing at page 6 as cited in the Appendix, concerns the Court's resolution of those federal issues.

In 1973, the California Legislature enacted Business and Professions Code section 23672 which prohibited a state licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he was designated as an authorized importer by a licensee who filed the minimum retail price schedule for that brand in accordance with the existing state fair trade liquor statutes.[1/]

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1. Stats. 1973, ch. 707, p. 1283, § 1:

"23672. A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated

That latter licensee was necessarily the brand owner, or the brand owner's California agent.

This statute was strictly enforced by the California Department of Alcoholic Beverage Control until 1978, when the California Supreme Court ruled that the State distilled spirits fair trade statute was in violation of the Sherman Act.[2/] At that time, because minimum retail price schedules were no longer permitted, the Department took the position that, as there was no longer any licensee available who could file a minimum retail price

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as the authorized importer of such brand by the licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

2. Rice v. Alcoholic Beverage Appeals Board, 21 Cal.3d 431 (1978).

schedule, it would no longer enforce the statute.

Among the respondents are licensed importers and wholesalers of distilled spirits as well as licensed retailers of distilled spirits. The importer respondents, no longer being under enforceable statutory restraint, secured sources of supply of national brand distilled spirits in Oklahoma and imported them into California.

This was permissible under Oklahoma law which provided that a distiller choosing to sell distilled spirits in that state must sell to all licensed Oklahoma wholesalers and may not discriminate either as to price or as to quantity.[3/]

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3. Okla. Stats. 1961, Vol. 12, tit. 37, § 501 et seq.

The distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate which the seller sells in any other state.[4/] The licensed wholesalers may sell to any licensed retailer or wholesaler within Oklahoma, and may sell distilled spirits out of Oklahoma to "qualified persons."[5/]

In 1979, the California Legislature, purposely seeking to correct this new method of importation growing sporelike on the surface of the existing three-tiered statutory structure of the state's liquor distribution system, amended the importer designation statute to read:

"§ 23672. A licensed importer

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4. Id. § 536.1, subd. (a).
5. Id. § 521, subd. (e).

shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of a licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." 6/

The purpose of this amendment was to put the law back to where it was before the State Supreme Court declared the retail price maintenance law invalid; i.e., the brand owner or his authorized agent

6. Stats. of 1979, ch. 280, § 1. Only the first sentence was amended. The second sentence remained unchanged.

was the only person who could file the minimum retail price schedule and hence designate the importer under the old law; the brand owner or his authorized agent is the only person who can designate the importer under the new law.

Respondents successfully brought an original proceeding in the California Court of Appeal, Third Appellate District, for a writ of mandate permanently ordering the instant petitioner, Director of the California Department of Alcoholic Beverage Control,"to refrain from enforcing that portion of Business and Professions Code section 23672 which provides:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorizied importer of such brand by the brand

owner or his authorized agent." (Norman Williams Company, et al. v. Rice, 108 Cal.App.3d 348, 353 (1980); ptn. for hrg. den. by Calif. Supreme Court.)

The decision of the Court of Appeal was based entirely on federal grounds:

"We find that the substantial federal policies of the Sherman Act are violated by the liquor designation statute and, in light of clear alternatives to that statute, the state interests sought to be achieved are not sufficient to outweigh those policies. We conclude that Business and Professions Code section 23672, as amended by Assembly Bill Number 499 (Stats. 1979, ch. 280, § 1) is invalid to the extent it authorizes private action in restraint of trade." (Norman Williams, supra, at p. 362.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN CALIFORNIA LIQUOR DEALERS v. MIDCAL ALUMINUM, 455 U.S. 79 (1980) WITH REGARD TO THE TWENTY-FIRST AMENDMENT GRANT TO THE STATES OF VIRTUALLY COMPLETE CONTROL OVER IMPORTATION OF LIQUOR AND STRUCTURE OF THE LIQUOR DISTRIBUTION SYSTEM

In California Liquor Dealers v. Midcal Aluminum, 455 U.S.97 (1980), this Court emphasized that there was much more to the Twenty-first Amendment than whether a state could merely determine whether or not to permit importation of alcoholic beverages within its borders. Tracing the history of the states' powers under the Twenty-first Amendment, this Court said:

"In determining state powers

under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. State Board v. Young's Market Co., 299 U.S. 59, 63-64 (1936). [Fn. omitted.] In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. Ziffrin Inc. v. Reeves, 308 U.S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority."

"It then pointed out that ". . .

early decisions . . . recognized that each State holds great powers over the importation of liquor from other jurisdictions"; that, "(s)ubsequent decisions have given 'wide latitude' to state liquor regulation . . . but they have also stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment"; that it was more difficult to define ". . . the extent to which Congress can regulate liquor under its interstate commerce power"; that the Twenty-first Amendment and the Commerce Clause ". . .each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case"; that "(t)his pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for

anticompetitive conduct not mandated by a State." (Midcal, supra, at pp. 106-109.)

The Court continued:

"These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" (Midcal, supra, at p.110.)

The preceding paragraph was highlighted when, in a post-opinion letter to Mr. Justice Powell, counsel for Midcal unsuccessfully urged that the Court delete or amend the language so no inference could be taken which would indicate that the states had such broad powers under the Twenty-first Amendment unless the state itself excluisvely operated the liquor business within its boundaries.

Further emphasis was given to the Midcal recognition of the Twenty-first Amendment's grant of practically plenary power to the states over whether to permit importation and sale of liquor and how to structure the liquor distribution system by this Court's recent dismissal of the appeal in Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen, October Term, 1980, No. 80-189, for want of a substantial federal question. The issues framed by the

parties were essentially the same ones that are present in the instant case. The dismissal in that case would appear to be a strong indication that this Court intended to solidify the basic premise of its Midcal holding with respect to the extent of power the Constitution grants to the states under the Twenty-first Amendment. (See discussion in Stern & Gressman, Supreme Court Practice, Fifth Edition, pages 323 et seq., and cases cited therein.)

In the instant case, the California Court of Appeal arbitrarily brushed aside the Midcal declaration regarding the Twenty-first Amendment grant "to the states of virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." With no analysis whatever, the Court concluded that it

simply was inapplicable, saying:

> "California has determined to permit the importation of liquor into the state by private parties and has established a distribution system of which the petitioners are a licensed part. In division 9 of the Business and Professions Code the state has provided detailed requirements for those who desire to engage in the distribution of alcoholic beverages and the petitioners have complied with those requirements and obtained state approval to participate in the distribution of liquor. The designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of

the channels of distribution. The designation statute, like the price maintenance laws, is precisely the type of regulation which must be reconciled with the federal interests in interstate commerce." (Norman Williams Co. v. Rice, supra, at p. 359.)

The conclusion of the Court of Appeal was erroneous.

A. Statutory Control Over Liquor Importers Is Directly Within The Twenty-first Amendment Grant Of The Power Of The States

The Court of Appeal completely ignored this Court's Midcal express citation to Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939), for the proposition that the Twenty-first Amendment grant to the States giving them control over the transportation or importation of liquor into their territories, ". . . logically entails

considerable regulatory power not strictly limited to importing and transporting alcohol." (Midcal, supra, at 107.)

It also ignored the lessons of earlier cases such as State Board v. Young's Market Co., 299 U.S. 59 (1936), which related to the requirement of a license fee for interstate alcohol beverage imports; Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938), which concerned restrictions on the type of liquor permitted to be imported from sister states; and Finch & Co. v. McKittrick, 305 U.S. 395 (1939) and Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 91; where, despite the Commerce Clause, the State authority was upheld because of the special powers granted to the States by the "importation or transportation" language of the Twenty-first Amendment.

The California statute under attack is a pure expression of the regulatory

power given by that Amendment. It seems clearly to go to the issue of "whether to permit importation." Under the statute, importation is only permitted if two factors coincide: (1) a licensed importer, and (2) a designation by a brand owner of that importer as one who has the brand owner's authorization to bring that particular brand of distilled spirits into the State. It is only from among the pool of those licensed importers who already have been investigated and qualified by the State that the choice may be made.

B. The Structure Of The Liquor Distribution System Is Directly Within The Twenty-First Amendment Grant Of Power To The States

The Court of Appeal totally ignored the constitutional grant of power to the States through the Twenty-first Amendment to structure the liquor distribution system.

Like many states, the California alcoholic beverage distribution system is based on a three-tiered structure: (1) distiller to (2) importer wholesaler to (3) retailer. (See Harris v. Alcoholic Bev. etc. Appeals Bd, 61 Cal.2d 305, 309 (1964); California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd., 5 Cal.3d 402, 407-408 (1971). Respondent importers operate outside this three-tiered system. They place orders with an Oklahoma broker or order taker who buys from the distiller and sells to the ordering importer. A fourth tier is thus now in existence outside the statutory scheme: (1) distiller to (2) broker to (3) importer wholesaler to (4) retailer.

The Court of Appeal recognized this intrusion on the structure of the liquor distribution system and the existence of a fourth tier, but attempted to bypass the legislative function entirely, by strangely concluding that the policy behind the three-tiered structure would be strengthened if this new fourth tier which the Legislature specifically attempted to prevent were permitted to operate. In a footnote, that Court said:

> "3/ The designation statute is actually directly contrary to the public policy behind the three-tier distribution system. The three-tier system was established to maintain the independence of the various levels of the liquor industry and to prevent the integration of manufacturing, wholesale and retail

functions. [Citing Harris v. Alcoholic Bev. etc. Appeals Bd., supra.] The designation statute reimposes the dependency of wholesalers upon brand owners which the three-tiered system was designed to prevent." (Norman Williams, supra, at p. 360.)

Assuming, arguendo, that the statute might be somehow contrary to the policy behind the three-tier structure issue, a conclusion to which we have strong exception, particularly since the Legislature enacted this new statute and must know its own policy, the question is not whether it might or might not effect the legislative policy, but rather does it require judicial alteration of the three-tier system. The Legislature

is the only proper group with the power to make that determination. If the legislative policy behind the three-tier system seems to a court to be jeopardized, the Legislature is the only body authorized to make the change to a four-tier system, not the Court.

Unquestionably here, there is a vital question as to whether a state Legislature has the constitutionally granted power under the Twenty-first Amendment to determine whether its liquor distribution system should be three-tiered or otherwise.

Permitting a local state court to substitute its judgment as to the details of the structure of the liquor distribution system on the theory that it has such power through interpretation of the Sherman Act, solely a federal ground, is

to deny the Midcal confirmation of constitutional grant to the State Legislature to formulate any liquor distribution system whatsoever. To hold otherwise would mean that if a local court found any restraint of trade resuling from any liquor statute, it could strike it down regardless of what legislative policy may have been present at its enactment. The enormity of the situation which would result is easily envisioned when it is realized that practically every liquor statute has some restraint of trade feature connected to it; i.e., prohibition of free goods, special rebates, free displays, inventory shelving, etc.

II. THE ERRONEOUS INTERPRETATION OF THE TWENTY-FIRST AMENDMENT, WITH RESPECT TO IMPORTATION OF LIQUOR, BY THE CALIFORNIA COURT OF APPEAL COULD HAVE A DIRECT DELETERIOUS EFFECT ON THE LAWS OF ALMOST ONE-THIRD OF THE OTHER STATES

There are a number of states which have enacted liquor control statutes that have the same, or a similar effect on importation of liquors as the California statute under consideration.[7/] Collectively, they are

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7. The statutes or regulations of fifteen such states and the District of Columbia, as set out in the Appendix to the Memorandum of Points and Authorities in Opposition to Petition for Writ filed by intervenor Wine & Spirits wholesalers of California in the Court of Appeal are: Ariz. Rev. Stat. Ann. § 4-243.01, Ark. Stat. Ann. § 48-305; Colo. Rev. Stat. § 12-47-128(2)(c) & (3); Conn. Gen. Stat. Ann. § 30-63 (West); D.C. Regs. A.B.C. Bd., tit. 3, ch. I, part 4, § 4.11; Fla. Stat. Ann. §§ 564.045, 565.095 (West); Ill. Ann. Stat. ch. 43, § 126 (Smith-Hurd); La. Rev. Stat. Ann. § 26-370B (West); Md. Regs. Comp. Treas., tit. 03, subtitl. 02, ch. 01, § 03.02.12; Mo. Ann. Stat. § 311.275 (Vernon); Neb. Rev. Stat.

commonly referred to as "primary source laws," i.e., they force wholesalers to purchase only from primary sources (distillers), and thus perpetuate the three-tier system of distribution referred to in section I,B, herein:

Typical examples are:

Arizona:

Ariz. Rev. Stat. Ann. § 4-243.01 provides in part:

"A. It is unlawful:

"1. For any supplier to solicit, accept or fill any order for any spirituous liquor from any wholesaler in this state unless the supplier is the primary source of supply for the brand of spirituous liquor sold or sought to be sold.

§ 53-130; N.J. Adm. Code § 13:2-36.4; N. Dak. Reg. St. Treas., §§ 84-02-01-04 R.I. Gen. Laws § 3-6-16; Tex. A.B.C. Code Ann. § 37.10 (Vernon); Wis. Stat. Ann. § 176.17(7) (West).

"2. For any wholesaler or any other licensee in this state to order, purchase or receive any spirituous liquor from any supplier unless the supplier is the primary source of supply for the brand ordered, purchased or received.

* * *

"E. For the purposes of this section:

"1. 'Primary source of supply' means the distiller, producer, owner of the commodity at the time it becomes a marketable product, bottler or exclusive agent of any such distributor or owner. In the case of imported products, the primary source of supply means either the foreign producer, owner, bottler or agent or the prime importer

from, or the exclusive agent in, the United States of the foreign distiller, producer, bottler or owner."

District of Columbia:

The regulations of the Alcoholic Beverage Control Board, tit. 3, ch. I, part 4, Section 4.11 provides:

"It shall be unlawful for any wholesaler to purchase any distilled spirits or wines for resale unless said alcoholic beverages are purchased from the primary American source of supply for the brand of distilled spirits or wines sought to be sold nor [sic] to sell any distilled spirits or wines to licensees within the District of Columbia if said alcoholic

beverages have not been purchased by said wholesaler from the primary American source of supply."

Regulation No. 73-21 further provides that:

"The term 'primary American source of supply' shall mean the owner of the aforesaid distilled spirits or wine at the time said beverages first become marketable products in the United States."

Significantly, these statutes and regulations require the wholesaler-importer to purchase only directly from the manufacturer-distiller. Axiomatic to three-tier system is the necessary designation of the wholesaler-importer by the manufacturer-distiller, a practice common to all industrial distribution, including the liquor trade.

The California statute, while worded

the other way, has the same effect. It prevents a licensed importer from importing liquor unless he is designated as an authorized wholesaler-importer by a manufacturer-distiller.

Interestingly, the California Court of Appeal actually interpreted the statute as if it read the way the other state statutes and regulation cited read:

> "The designation statute gives brand owners the unfettered power to restrain competition, not by relying upon any artifice such as tying arrangements or group boycotts, but by merely deciding who may and who may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed

California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine.

"It is suggested in opposition to the petition that brand owners have the inherent power to designate importers to whom they will sell and that the designation statute merely recognizes this power. We emphatically reject this construction of the statute. The statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturer to forbid others to sell to a disfavored importer. We are not concerned with any contractural channel of distribution

a brand owner might create or use; we are concerned with the state-provided authority to prevent trade among others. . . . " (Norman Williams, supra, at pp. 356-357.)

In Ziffrin v. Reeves, supra, 308 U.S. 132 (1939), this Court upheld a Kentucky statute which permitted manufacture of liquor only if it were to be sold to an indicated class of customers and transported in definitely specified ways. The Court found these conditions reasonable and "clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils and secure payment of revenue." (Ziffrin, supra, at p. 139). Of particular interest is the Court's comment:

"In effect we are asked by injunction to allow a distiller

to do what the statute prohibits--deliver to an unauthorized carrier. Also to enable a carrier to do what it is prohibited from doing - receive and transport within the State." (Ziffrin, supra, at 139.)

If we substitute the words "undesignated importer" for "carrier," the same lanugage could be used to show how wrong the Court of Appeal is in the instant case.

The Norman Williams' discussion cited above applies equally as well to California as to all those other states having similar primary source legislation. If this incorrect decisoin is allowed to stand, it will lead to direct attack on the laws and regualtions of each of those states.

III. THE ERRONEOUS INTERPRETATION OF THE TWENTY-FIRST AMENDMENT WITH RESPECT TO STRUCTURE OF THE LIQUOR DISTRIBUTION SYSTEM DIRECTLY EXPOSES EVERY STATE'S WHOLESALE LIQUOR LICENSE REGULATIONS TO ATTACK

One of the Court of Appeal's basic underlying premises is, apparently, that if any court believes a state-engendered statutory liquor distribution structure violates the Sherman Act, the Court has the duty to alter that legislatively determined structure if necessary; here, the Court does so by striking the statute, even though doing so creates a four-tier instead of a three-tier liquor distribution system in the state.

The Court of Appeal thus totally ignores the Twenty-first Amendment grant to the states of practically plenary power over the structure of liquor distribution system. It attempts to justify its position by reference to an interference

with interstate commerce" argument; however, it fails to realize that the Twenty-first Amendment prevails over the Commerce Clause where importation or the distribution system is involved. (Midcal, supra, at p. 110.)

We are not dealing here with a price statute which has been held to be an "other" regulation outside the structure of the liquor distribution system.(Midcal, supra, at p. 110.) Here, we are right in the middle of such a structure, i.e., can the state perpetuate a three-tier system of distribution if doing so might have some restraint on interstate commerce wich the creation of a fourth tier will alleviate?

It is submitted that once we find outselves truly in a "structure" context, as in the instant case, we then logically are forced to conclude that the Twenty-

first Amendment takes precedence over the Commerce Clause in this instance. This is so because our case falls within the structure grant of State powers under the Twenty-first Amendment.

Additionally, in order to develop a harmonious relationship between these two sections of the Constitution, we readily may do so if we consider the Twenty-first Amendment grant as a specific power directed at the structure of the liquor distribution system, and the Commerce Clause as a more general restriction on the power of the States to govern the liquor traffic within their borders in those other instances where it may be applicable.

The Court of Appeal reached an incorrect conclusion because it failed to realize that its creation of a legal fourth

tier of operation was a restructuring of the State's liquor distribution system, a matter solely within the constitutional grant to the Legislature.

If this decision stands, the entire liquor distribution structure developed by each state legislature will be directly exposed to attack in the courts and subject to alteration as judges may see fit.

IV. THE ERRONEOUS COURT OF APPEAL DECISION SOLELY ON FEDERAL GROUNDS, CLOUDS EXISTING ANTI-TRUST LAW BY CREATING A NEW PER SE ILLEGALITY CATEGORY WHICH SHOULD BE CAREFULLY EXAMINED BY THIS COURT

The Court of Appeal opinion is incorrectly based on the applicability of the Sherman Act over the Twenty-first Amendment. If this approach is taken, the Court of Appeal is still in error and certiorari should be granted to overturn its ruling.

In the instant opinion, the Court of Appeal listed a number of the "per se illegalities" among Sherman Act anti-trust law considerations established by the United States Supreme Court, i.e., "certain practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable." The list included tying arrangements, agreements among competitors to divide markets or allocate customers, group boycotts, agreements to limit production, and price fixing. (Norman Williams Co. v. Rice, supra, pp. 355-356.)

The Court of Appeal then conceded that the instant case was not one of the recognized per se categories, but nevertheless treated it as a per se case:

"Petitioners attempt to analo-

gize Business and Professions Code section 23672 to certain per se violations of the Sherman Act in order to demonstrate its invalidity. The opposition to the petition argue that the statute does not clearly come within a declared per se violation and must be upheld in this proceeding. It is difficult to analyze the designation statute in terms of common violations of the Sherman Act because of the unique nature of the statute. The designation statute gives brand owners the unfettered power to restrain competition, not by relying upon any artifice such as tying arrangements or group boycotts, but by merely deciding who may and who may not compete. In effect, that statute

gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine: (Norman Williams, supra, p. 356.)

"The section does not merely authorize a private party to engage in practices which may restrain interstate trade; rather, it gives private parties the unfettered power to forbid interstate trade between other private parties. Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act. We conclude that Business and Professions

Code section 23672 is invalid unless the state action exemption to the Sherman Act or the Twenty-first Amendment to the United States Constitution authorizes such a delegation of authority." (Norman Williams, supra, p. 358.)

But, regardless of how clear the Court of Appeal may be able to visualize the power to restrain interstate trade because of the instant statute, it may not properly reach the conclusion that the case should be treated as if it were a per se case.

Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (1977) is almost directly in point. There, Coors' attempt to prevent a retailer from selling beer to a wholesaler in another state was

held not be be a per se violation of the Sherman Act:

> "A & S contends that the trial court erred in failing to instruct the jury that Coor's efforts at firm and resolute enforcement of territorial restrictions on the resale of its products constituted a per se violation of Section 1 of the Sherman Act.
>
> ". . . The Supreme Court decision in Continental T.V., Inc. v. GTE Sylvania Incorporated, supra, disposes of this issue adversely to A & S." (Coors, supra, at p. 812.)

It is thus clear that there is no per se violation because of the instant statute. That being the case, the only way the Court of Appeal could ever possibly reach a conclusion of violation of the Sherman Act on the theory that the

statute unreasonably restrained trade would be by analogy to the so-called "rule of reason" test, assuming it is even applicable here.

Parenthetically, we are unaware of any case where the rule of reason has been applied to invalidate a statute. In the customary situation, the test is applied to the conduct of parties, not enactments of legislative bodies.

Under the rule of reason test,

> ". . . the court must originally consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason

for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts . . . . " (Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).)

The "rule of reason" was discussed recently in Continental TV, Inc. v. GTE Sylvania, Inc. (Sylvania), 433 U.S. 36 (1977). In that case, the Court reconsidered and overruled United States v. Arnold Schwinn & Co. (Schwinn), 388 U.S. 365 (1967)

In Schwinn, it had held a per se violation of the Sherman Act occurred when there existed a manufacturer-imposed limitation on customers to whom a distributor could sell after title to the goods was acquired by the distributor.

In Sylvania, the Court held that

there was no per se violation of the Sherman Act where Sylvania had included in its retailer franchise agreements a prohibition against the sale of its branded products except from specific locations.

None of the considerations required by the rule of reason test was investigated by the Court of Appeal in the instant case. It merely followed the pattern and structure of the Midcal decision, i.e., determination of per se violation; determination that it was not exempt as state action under the doctrine of Parker v. Brown, 317 U.S. 341 (1943); determination that it was not immune under the Twenty-first Amendment. That was essentially the extent of the Court of Appeal analysis.

The failure of the Court of Appeal

to apply the analogy of the rule of reason test assuming, arguendo, that the test is even applicable, caused it to reach its erroneous conclusion as to invalidity of the statute under the Sherman Act.

Unless the instant case is reversed, a new principle will quickly creep into the body of antitrust law, i.e., if something is not a per se situation, but may be like it in some respects, it should be treated as if it were a per se case, with no further analysis, and the rule of reason approach should be totally disregarded.

COMCLUSION

This Court will recall that when California Retail Liquor Dealers Association v. Midcal, supra, was before it earlier this year, the California Department of Alcoholic Beverage Control declined

to join in the Petition for Certiorari. (Note Midcal, supra, footnote 12, p. 111.)

In the instant case, however, the Director, again a respondent below, and now the petitioner in this Petition for Certiorari, is strongly urging that the Court of Appeal in Norman Williams has totally misinterpreted the import of this Court's opinion in the Midcal case. Here, there are valid State interests that can be pointed to which directly concern the importation of liquor and the structure of the liquor distribution system.

Midcal draws a line below which the State cannot go, i.e., it cannot enact a liquor statute which delegates to private persons the totally unsupervised power to fix prices. That is obviously one of those ". . . other liquor regulations. . . subject to the federal commerce power in

appropriate situations. . . . " (Midcal, supra, at p. 110.)

On the other side of the line, however, is the Twenty-first Amendment grant to the states of ". . . virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (Midcal, supra, at p. 110.)

Petitioner urges that the California statute, which prohibits a licensed liquor importer from purchasing or accepting delivery of any brand unless he is designated as an authorized importer of the brand by the brand owner, is totally within both the constitutionally granted power to determine whether to permit importation and within the power to determine how the liquor distribution system should be structured.

The statute under consideration is within the explicit grant of authority given to the States by the Twenty-first Amendment.

The statute sets up three tiers of distribution in the California liquor industry, i.e., manufacturer-distiller to importer-wholesaler, to retailer. The Court of Appeal decision under attack recognizes this three-tier structure common to the California liquor industry for many years, but amazingly concludes that even though the statute preserves the three-tier structure, it somehow has the effect of destroying the legislative policy behind the three-tier system. The Court of Appeal concludes that by striking down the statute and letting a legislatively anticipated illegal fourth tier operate (distiller to Oklahoma broker, to

importer-wholesaler, to retailer), it will perpetuate the legislative policy behind the three-tier structure.

The Court of Appeal erred because it placed the importer designation statute in the same vein as the retail price maintenance statute found invalid in Midcal. Admitting that no per se violation of the Sherman Act existed, it nevertheless decided that the importer designation should be treated as if it were a per se case. With no analysis analogous to that used in rule of reason cases, it found the importer designation statute invalid.

Significantly, some 15 states and the District of Columbia have statutes or regulations which have the same or a similar effect as the California statute under consideration, i.e., the importer-wholesaler is required to purchase from

the primary source, the distiller.

Unless certiorari is granted, the liquor laws of each of those other States will be in gross jeopardy and subject to immediate attack in the courts of those several States.

Additionally, because of the newly created per se violation of the Sherman Act, unless this decision is corrected, the entire field of federal antitrust law will be left muddied and confused.

For the foregoing reasons, this Court should issue its Writ of Certiorari to the California Court of Appeal, Third Appellate District, to review the judgment

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in the case of Norman Williams Co., et al., v. Rice, No. 3 Civ. 19089, decision filed July 17, 1980, and reported at 108 Cal.App. 3d 348 (1980).

Respectfully submitted,

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Deputy Attorney General

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of Alcoholic Beverage
Control

GJR:mlh

July 17, 1980
CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

Sacramento 3 Civil 19089

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, Inc., a California corporation doing business as GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, Inc., a California corporation; FREDERICA AULDRIDGE, doing business as SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE, doing business as TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY, doing business as HOUSE OF FINE SPIRITS,

Petitioners,

v.

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenor,

BOHEMIAN DISTRIBUTING COMPANY,

Intervenor.

ORIGINAL PROCEEDING; application for a writ of mandate. Writ issued.

Feldman, Waldman & Kline, Leland R. Selna, Jr., Max Lieberman, George G. Weickhardt and Thomas W. Martin for Petitioners.

Harry M. Snyder and Luana L. Martilla as Amici Curiae on behalf of Petitioners.

George Deukmejian, Attorney General, and George J. Roth, Deputy Attorney General for Respondent.

Pillsbury, Madison & Sutro, Noble K. Gregory, Parker A. Maddux, Gary W. Jackson, Heller, Ehrman, White & McAuliffe, Stephen V. Bomse, White & Case, Macdonald Flinn, Edna R. Sussman, Douglas W. Metz, Abraham Tunick, Richman & Garrett, Lionel Richman, Ivan J. Potts, Michael J. Shelley, and James M. H. Ball as Amici Curiae on behalf of Respondent.

Ball, Hunt, Hart, Brown and Baerwitz, Joseph A. Ball, Anthony Murray, Michael J. Maloney, James Polish, William T. Chidlaw, Wyman, Bautzer, Rothman & Silbert, Frank Rothman and Christina A. Snyder (Los Angeles, California), Wyman, Bautzer, Rothman, Kuchel & Silbert and George Miron (Washington D.C.) for Intervenors.

In this proceeding in writ of mandate we are called upon to determine the validity of that portion of Business and Professions Code section 23672 (as amended by Assem. Bill No. 499, Stats. 1979, ch. 280, § 1; hereinafter "designation statute"), which provides that a licensed importer

shall not purchase or accept delivery of any brand of distilled spirits unless designated as an authorized importer of such brand by the brand owner or its authorized representative. We conclude for reasons which we explain, that the designation statute is invalid. Accordingly, we issue the writ.[1]

* * * *

This dispute arises out of the determination by the appellate courts of this state that California's alcoholic beverage price maintenance laws are invalid. Prior to 1978 the Business and Professions Code contained price maintenance provisions concerning all aspects of the alcoholic beverage industry. In Rice v. Alcoholic

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1 The intervenors have moved to strike the documents filed as exhibits in support of the petition. We do not rely upon those documents in reaching our decision herein, and the motion is therefore denied as moot.

Bev. etc. Appeals Bd. (1978) 21 Cal.3d 431, the California Supreme Court unanimously determined that the price maintenance provisions relating to the retail sale of distilled spirits were in violation of the Sherman Act (15 U.S.C. § 1 et seq.), and that no legitimate state interest outweighed the policies of the Sherman Act. (Id., at p. 459.) The Court declared the price maintenance provisions relating to retail sales of distilled spirits invalid. (Ibid.)

In Capiscean Corp. v. Alcoholic Bev. Etc. Appeals Bd. (1979) 87 Cal.App.3d 996, the First District Court of Appeal considered the validity of the price maintenance provisions relating to the retail sale of wine. The court found the decision in Rice, supra, controlling and declared those provisions to be invalid. The alcoholic beverage price maintenance

laws reached this court in Midcal Aluminum, Inc. v. Rice (1979) 90 Cal.App.3d 979. We considered the validity of the price maintenance laws relating to the wholesale and retail sale of wine and concluded that thos laws were invalid under the decision in Rice, supra.

An intervenor in Midcal Aluminum, Inc. v. Rice, supra, the California Retail Liquor Dealers Association, petitioned the California Supreme Court for a hearing but that Court declined to hear the case. The dealers association then sought certiorari from the United States Supreme Court, which was granted. (___U.S.___ [62 L.Ed.2d 31].) On March 3, 1980, the United States Supreme Court issued its decision in California Liquor Dealers v. Midcal Aluminum (1980) ___ U.S. ___ [63 L.Ed.2d 233].) The Court unanimously

(Brennan, J. not participating) affirmed this court's decision, and approved the California Supreme Court's opinion in Rice, supra. California's alcoholic beverage price maintenance laws are thus no longer enforced.

Prior to the judicial decisions striking down the alcoholic beverage price maintenance provisions of the Business and Professions Code, section 23672 of that code provided: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as the authorized importer of such brand by the licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized

warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." When the price maintenance provisions were declared invalid, the Department of Alcoholic Beverage Control took the position that section 23672 became unenforceable because there were no longer any minimum retail price schedules required to be filed.

Among the petitioners are licensed importers and wholesalers of distilled spirits as well as licensed retailers of distilled spirits. After the price maintenance provisions of the Business and Professions Code were declared invalid the importer petitioners secured sources of supply of national brand distilled spirits in Oklahoma, referred to as the "Oklahoma connection." Under Oklahoma law a distiller who chooses to sell distilled spirits in Oklahoma must sell to all

licensed Oklahoma wholesalers and may not discriminate either as to price or as to quantity. (12 O.S. 1961, tit. 37, §§ 501 et sec.) The distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate at which the seller sells in any other state. (Id., § 536.1, subd. (a).) The licensed wholesalers may sell to any licensed retailer or wholesaler within Oklahoma, and may sell distilled spirits out of Oklahoma to "qualified persons." (Id., § 521, subd. (e).) The importer petitioners have been able to purchase national brand distilled spirits in Oklahoma, import such distilled spirits to California, and sell these products to licensed retailers at prices below the suggested wholesale prices which the distillers provide to their designated wholesalers.

The amendment of Business and

Professions Code section 23672 provided for by Assembly Bill 499 amends the language of that section to read: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." (Stat. 1979, ch. 280, § 1.) This provision would effectively preclude the importer petitioners from competing for the wholesale market of certain national brands, because they have been denied designation as authorized importers by the brand owners. The petitioners thus will be unable to secure these brands from the distillers

and are precluded from purchasing such brands from oklahoma sellers.

The importer petitioners seek a peremptory writ of mandate or alternatively prohibition ordering the Department of Alcoholic Beverage Control not to enforce section 23672 so that they may continue to compete in the wholesale distilled spirit market with national brands obtained from Oklahoma sellers. The retailer petitioners seek such a writ so that they may continue to purchase national brand distilled spirits at prices below the distillers' suggested wholesale prices. We issued an alternative writ of mandate and stayed enforcement of the statute pending the return to the writ and further order of this court.

The basis of the judicially declared invalidity of the California alcoholic beverage price maintenance provisions was the Sherman Antitrust Act, 15 United States

Code, sections 1 et seq. (Rice v. Alcoholic Bev. Etc. Appeals Bd., supra. 21 Cal.3d at p. 459; Midcal Aluminum, Inc. v. Rice, supra, 90 Cal.App.3d at p. 984; Capiscean v. Alcoholic Bev. Etc. Appeals Bod., supra, 87 Cal.App.3d at pp. 999-1000.) In view of the United States Supreme Court's approval of the California appellate opinions, it is clear that the Sherman Act applies to interstate commerce in alcoholic beverages. (California Liquor Dealers v. Midcal Aluminum, Inc., supra, ___U.S.___ [63 L.Ed.2d at p. 245].) We thus consider whether Business and Professions Code section 23672, as amended, is in violation of the Sherman Act.[2]

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2 The argument is made that this court does not have jurisdiction to consider the contentions raised relating to the Sherman Act, since suits arising under that Act must be brought in federal court. We reject this contention. Petitioners are not seeking a private remedy against private parties in this action. They are suing to

enjoin enforcement of a state statute which is alleged to be invalid under the Sherman Act. We may consider whether the statute is valid in a proceeding for writ of mandate. (See Midcal Aluminum, Inc. v. Rice, supra, 90 Cal.App.3d 984; Alpha Beta Mkts. v. Amal. Meat Cutters (1956) 147 Cal.App.2d 343, 351.)

The California Supreme Court's opinion in Rice is instructive on the course of the inquiry we must make. We must first consider whether the scheme, in the absence of governmental sanction, would violate the Sherman Act. If the scheme would violate the Sherman Act in the absence of governmental sanction, we must then consider whether governmental sanction for the scheme validates the scheme despite the Sherman Act. That inquiry is two-fold. It must be determined whether the marketing scheme is within the state action exception to the Sherman Act as stated in Parker v. Brown (1942) 317 U.S. 341 [87 L.Ed. 315], or whether the Twenty-first Amendment to the United States Constitution reserves to the state the power to authoirze such a scheme. (Rice, supra, 21 Cal.3d at pp. 439-447.)

The Sherman Act

The purpose of the Sherman Act ". . . is to prevent or suppress devices or practices which create monopolies or restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade." (54 Am.Jur.2d, Monopolies, Etc., § 1, p. 668; fns. omitted.) "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise

open to question, the policy unequivocally laid down by the Act is competition." (Northern P. R. Co. v. United States (1958) 356 U.S. 1, 4 [2 L.Ed.2d 545, 459].)

The judicial opinions interpreting the Sherman Act have provided a judicial gloss to its meaning. Although the Act is literally all-encompassing, the courts have construed it as precluding only actions which "unreasonably" restrain competition. (Id., 356 U.S. at p. 5 [2 L.Ed. 2d at p. 549].) There are, however, certain practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable. (Ibid.) This is the doctrine of per se illegality. All actions which are not per se unreasonable are subject to the "rule of reason." (Continental T.V. Inc. v. GTE Sylvania Inc. (1977) 433 U.S. 36, 49-50 [53 L.Ed.2d 568, 580].) Under the rule

of reason the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. (Ibid).

Among the types of conduct which have been declared per se illegal are tying arrangements, agreements among competitors to divide markets or allocate customers, group boycotts, agreements to limit production, and price fixing. (54 Am.Jur.2d, Monopolies, Etc., supra, § 32, p. 687.) Price fixing, without more, is illegal because it eliminates one form of competition. (United States v. Univis Lens Co. (1941) 316 U.S. 241, 252 [86 L.Ed. 1408, 1419]; United States v. Trenton Potteries Co. (1927) 273 U.S. 392, 397 [71 L.Ed. 700, 706; 50 A.L.R. 989].) Group boycotts are per se illegal because they "cripple the freedom of traders and thereby

restrain their ability to sell in accordance with their own judgment," thus restraining competition. (Kiefer-Stewart Co. v. Seagram & Sons (1951) 340 U.S. 211, 213 [95 L.Ed. 219, 223]. See also Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207, 212 [3 L.Ed.2d 741, 745].) Tying arrangements, whereby a seller agrees to sell one product but only on the condition that the buyer purchase a different product as well, curb competition with respect to the tied product and are thus illegal per se. (See Northern P. R. Co. v. United States, supra, 356 U.S. at pp. 5-6 [2 L.Ed.2d at p. 550].) In fact, all per se violations are declared to be so because by their nature they are manifestly anticompetitive. (See Continental T.V. Inc. v. GTE Sylvania Inc., supra, 433 U.S. at pp. 49-50 [53 L.Ed.2d at p. 580].)

Petitioners attempt to analogize

Business and Professions Code section 23672 to certain per se violations of the Sherman Act in order to demonstrate its invalidity. The opposition to the petition argue that the statute does not clearly come within a declared per se violation and must be upheld in this proceeding. It is difficult to analyze the designation statute in terms of common violations of the Sherman Act because of the unique nature of the statute. The designation statute gives brand owners the unfettered power to restrain competition, not by relying upon any artifice such a tying arrangements or group boycotts, but by merely deciding who may and who may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed

Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine.

It is suggested in opposition to the petition that brand owners have the inherent power to designate importers to whom they will sell and that the designation statute merely recognizes this power. We emphatically reject this construction of the statute. The statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturer to forbid others to sell to a disfavored importer. We are not concerned with any contractural channel of distribution a brand owner might create or use; we are concerned with the state-provided authority to prevent trade among others. In this respect it is irrelevant that the statute gives brand owners the

power to restrain intraband competition rather than interbrand competition. (See United States v. Topco Associates (1971) 405 U.S. 596, 610-611 [31 L.Ed.2d 515, 527].)

The opposition to the petition cite Continental T.V. Inc. v. GTE Sylvania, Inc., supra, 433 U.S. 36 [53 L.Ed.2d 568], in support of the contention that the power provided to brand owners by the designation statute does not violate the Sherman Act. In that case Sylvania sold televisions through a franchise plan. Sylvania limited the number of franchises for any given area and required each franchiser to sell only from the location or locations at which he was franchised. A franchise did not constitute an exclusive territory and Sylvania retained the discretion to increase the number of retailers in an area. Continental was a

successful San Francisco franchisee that sought and was refused permission to open a franchise in Sacramento. On certiorari the United States Supreme Court considered whether the franchise plan was a per se violation of the Sherman Act and concluded that it was not. A vertical restriction of territory, unlike a horizontal restriction, must be judged under the rule of reason. (Id., 433 U.S. at p. 59 [53 L.Ed. 2d at p. 585].)

We find the decision in Continental T.V. Inc. v. GTE Sylvania Inc. to be inapposite to the statutory provision which we consider. That case involved a manufacturer's chosen method of product distribution enforced by a refusal to sell to retailers outside of their assigned territories. Petitioners herein do not attack the decision of distillers to

refuse to trade with them; rather, they attack the state provided authority of the distillers to prohibit them from trading with others. Nothing in Continental T.V. Inc. v. GTE Sylvania Inc. authorizes a state to delegate such power to a private party.

Article I, section 8, subdivision (3) of the United States Constitution gives to the federal government the exclusive power to regulate interstate commerce. Pursuant to that power Congress passed the Sherman Act, with its unequivocal policy of encouraging competition. (Northern P. R. Co. v. United States, supra, 356 U.S. at p. 4 [2 L.Ed.2d at p. 549].) Business and Professions Code section 23672 gives private parties the unqualified power to prevent interstate commerce between other private

parties, and uses the coercive power of the state to enforce such power. That section does not merely authorize a private party to engage in practices which may restrain interstate trade; rather, it gives private parties the unfettered power to forbid interstate trade between other private parties. Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act. We conclude that Business and Professions Code section 23672 is invalid unless the state action exception to the Sherman Act or the Twenty-First Amendment to the United States Constitution authorizes such a delegation of authority.

The State Action Exception

There can be no doubt that the designation statute involved herein is not within the state action exception to the

Sherman Act. In California Liquor Dealers v. Midcal Aluminum, Inc., supra, ___U.S.___ [63 L.Ed.2d 233], the Supreme Court noted two standards for antitrust immunity. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by the state itself. (Id., ___U.S.___ at p.___ [63 L.Ed.2d at p. 243].) The Court found California's alcoholic beverage price maintenance laws to be without the state action exception because "The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage

in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." (Ibid.; fn. omitted.)

The designation statute involved is likewise devoid of state involvement. The state has specified no standard to be applied by the private parties in reaching their decisions to forbid competition, does not oversee the choices made, and does not otherwise participate. The state, for its part, has licensed the importer petitioners to engage in the importation of alcoholic beverages, but then provided other private parties with the unfettered power to restrain them from engaging in the trade for which they are licensed. Business and Professions Code section 23672

is clearly not within the state action exception to the Sherman Act.

The Twenty-First Amendment

In California Liquor Dealers v. Midcal Aluminum, supra, the Supreme Court held ". . . that there is no bright line between federal and state powers over liquor. The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" (Id., ___U.S.___ at p. ___ [63 L.Ed.2d at p. 246].) The Court considered

California's interest in its price maintenance laws and found that "[t]he unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act." (Id., ___U.S.___ at p. ___ [63 L.Ed.2d at p. 248].)

We reject the contentions of those opposed to the petition for a writ of mandate that the designation statute is within the state's virtual complete control over whether to permit importation or sale of liquor and how to structure the distribution system. California has determined to permit the importation of liquor into the state by private parties and has established a distribution system of which the petitioners are a licensed part. In division 9 of the Business and Professions Code the state has

provided detailed requirements for those who desire to engage in the distribution of alcoholic beverages and the petitioners have complied with those requirements and obtained state approval to participate in the distribution of liquor. The designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution. The designation statute, like the price maintenance laws, is precisely the type of regulation which must be reconciled with the federal interests in interstate commerce.

In the balancing process we are requiredto determine what policies are furthered by the state statute, whether that statute clearly vindicates those policies, and whether and to what degree

the policy underlying the Sherman Act is undermined by that statute. (Rice v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d at p. 451.) In California Liquor Dealers v. Midcal Aluminum, supra, the United States Supreme Court noted that the federal interest in enforcing the national policy in favor of competition is both familiar and substantial, citing a prior decision in which it was stated: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." (California Liquor Dealers v. Midcal Aluminum, supra, ___U.S.___ at p. ___ [63 L.Ed.2d at p. 246]; citing United States v. Topco

Associates, supra, 405 U.S. at p. 610 [31 L.Ed.2d at p. 527.].) The grant of power to a private party to prohibit interstate commerce between other private parties and to limit competition in the California wholesale market results in a complete undermining of the federal policies embodied in the Sherman Act. We must consider whether there is a sufficient state interest to outweigh this result.

Those opposed to the petition for a writ of mandate have suggested several state interests purportedly served by the designation statute. We are told that the statute will facilitate the monitoring and tracing of imported distilled spirits and aid in the collection of excise taxes, assist in the maintenance of the three-

tier system of distribution,[3] preserve the competitive viability of small retailers, prevent predatory business practices, protect the brand owners' rights to their goodwill,[4] promote stable labor relations,

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3. The designation statute is actually directly contrary to the public policy behind the three-tier distrubution system. The three-tier system was established to maintain the independence of the various levels of the liquor industry and to prevent the integration of manufacturing, wholesale and retail functions. (Harris v. Alcoholic Bev. Etc. Appeals Bd. (1964) 61 Cal.2d 305, 309.) The designation statute reimposes the dependency of wholesalers upon brand owners which the three-tier system was designed to prevent.

4. It is difficult to understand how the brand owners believe that their "right to their goodwill" could justify the type of unlimited power to restrain competition authorized by the designation statute. Federal copyright, patent and trade mark laws are designed to protect such rights and those laws preclude the control over the distrubiton system granted by the designation statute. A seller of goods may attempt to contractually limit resale or refuse to sell to those who resell in violation of its policies, but the Sherman Act renders such action illegal if it unreasonably restrains trade. The type of

and promote temperance.

We do not perceive that the designation statute will clearly vindicate these interests. The California liquor industry is heavily regulated and there are numerous provisions designed to insure that each legitimate state interest is fully realized. The broad grant of anti-competitive power to private parties will certainly vindicate private concerns, but would appear to be relatively insignificant in vindicating state interests. In this respect it must be noted that the designation statute is drastically overbroad. It provides no standards which brand owners are to apply in reaching their decisions. Brand owners are given the unqualified power to restrain interstate trade without regard to whether the

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control over competition granted by the designation statute is simply antithetical to a free enterprise economy.

exercise of that power actually furthers a state interest and despite the fact that their decisions might actually impede state interests. Further, the decisions of the brand owners are final, there is no review by the state agency charged with enforcing those decisions to ensure that state interests are in fact furthered. As noted by the United States Supreme Court concerning decision making which affects competition: "Private forces are too keenly aware of their own interests in making such decisions. . . . " (United States v. Topco Associates, supra, 405 U.S. at p. 611 [31 L.Ed.2d at p. 528].)

Another important factor in the balancing process we must undertake is whether there are other means by which the state interest may be served without running afoul of the Sherman Act. (Rice

v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d at p. 458.) There are clear alternatives to the designation statute which will further state interests. The importation and sale of liquor is subject to heavy regulation by the state. Licensing restrictions and reporting requirements, as well as regulations to control and prevent unfair trade practices, are available to vindicate state interests. Each legitimate state interest in the importation and sale of liquor may be properly served without resort to a statute in direct contravention to the policies of the Sherman Act.

The most important alternative means of promoting the asserted state interests in exemplified by the regulatory programs upheld against attack under the Sherman Act in Parker v. Brown, supra, 317 U.S.

341 [87 L.Ed. 315]; and New Motor Vehicle Bd. v. Orrin W. Fox Co. (1978) 439 U.S. 96 [58 L.Ed.2d 361]. In each of those cases California furthered its interests by authorizing private action which would violate the Sherman Act if undertaken by private parties without governmental sanction. In each of those cases the regulatory programs were upheld by the United States Supreme Court because California did not merely authorize a violation of the Sherman Act, it involved itself in the decision-making process. In each case a state agency maintained control and subjected the private party decisions to pointed reexamination to insure that the policies of the Sherman Act were not unnecessarily subordinated to state policy. (See Rice v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d at pp. 441-445.)

Under the California Constitution, the Department of Alcoholic Beverage Control is given the exclusive power to license the importation and distribution of liquor in California. (Cal. Const., art XX, § 22.) The Alcoholic Beverage Control Appeals Board is established to review decisions of the department. (Ibid.) Despite the ready availability of these regulatory agencies to control and review decisions of private parties in regards to the importation of liquor, the designation statute confers absolute and unqualified power upon private parties to restrain interstate commerce in distilled spirits. That power may be exercised by the private parties without regard to the potentially devastating effects it may have upon federal interests and without regard to whether it actually serves state interests.

We find that the substantial federal policies of the Sherman Act are violated by the liquor designation statute and, in light of clear alternatives to that statute, the state interests sought to be achieved are not sufficient to outweigh those policies. We conclude that Business and Professions Code section 23672, as amended by Assembly Bill number 499 (Stats. 1979, ch. 280, § 1), is invalid to the extent it authorizes private action in restraint of trade.

In view of our decision it is not necessary to consider petitioners' remaining contentions and we indicate no view as to how we would resolve those issues. Further, we are not concerned with that portion of Business and Professions Code section 23672 which requires that imported distilled spirits come to

rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer before sale to a retailer, and our decision shall not preclude enforcement of that requirement.

Let a peremptory writ of mandate issue ordering respondent to refrain from enforcing that portion of Business and Professions Code section 23672 which provides: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." (CERTIFIED FOR PUBLICATION.)

We concur: REYNOSO, J.

PUGLIA, P.J.

EVANS, J.

MATERIAL RELATING TO RAISING OF FEDERAL QUESTIONS

FROM PETITION FOR WRIT OF MANDATE

"Petitioners' constitutional rights will be violated if this statute is enforced against them. First, A.B. 499 improperly delegates to private parties the State's exclusive power to license the importation of alcoholic beverages into the State. It is not enough that an importer be licensed by the State. To import on any commercially significant scale, he must also be authorized to import a nationally advertised brand by one of the big distilling companies. Since the big distillers in substance have veto power over the licensing process, the statute delegates the power to regulate importation to the distillers. Such delegation violates Article 20, Section 22 of the California

Constitution which expressly prohibits any delegation of the power to regulate the importation of alcoholic beverages. See attached Memorandum of Points and Authorities ('Memo'), pp. 20-28. Second, even in the absence of such an express constitutional provision prohibiting delegation, A.B. 499 would be an improper delegation since it fails to specify any standards for the exercise of the delegated power. Permission to import is committed to the unfettered discretion of the distillers with no procedure for reviewing their decisions. Accordingly, the statute denies petitioners both procedural and substantive due process in violation of Article 1, Section 7 of the California Constitution and the 5th and 14th Amendments to the

United States Constitution. See Memo, pp. 28-34. Third, the statute deprives petitioners of the equal protection of the laws as guaranteed by Article 1, Section 7 of the California Constitution and the 14th Amendment to the United States Constitution by discriminating, without any rational basis, between importers who are 'authorized' by the distillers and importers who are not. See Memo, pp. 34-42."
(Pages 12-13)

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TAKEN FROM MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

"A.B. 499 represents an even more drastic anticompetitive measure than the old fair trade laws. While the distillers were allowed to control prices under fair trade, A.B. 499 gives them the outright power to exclude the competitors of their chosen distributors altogether. A.B. 499 would allow a distiller to prohibit a duly licensed importer from importing that distiller's brand even if the importer had legally obtained the liquor in another state. A.B. 499 in effect grants monopoly power to private parties. Monopoly power is defined as 'the power to control prices or exclude competition'. American Tobacco Co. v. U.S., 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946); U.S. v. Grinnell Corp.,

384 U.S. 563 at 571, 86 S. Ct. 1698; 16 L. E. 2d 778 (1966).

"Viewed from another aspect, the statute gives the distillers a power which they could only achieve by means of a group boycott, which is per se illegal. For example, the statute gives the distiller the same illegal power which he would obtain by means of an agreement with all his distributors nationwide to refuse to sell or to deal with a competing price-cutting distributor in California. U.S. v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 6128, 82 S. Ct. 105, 86 L. Ed. 497 (1941); Klor's, Inc., v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959). Group boycotts are said to be per se illegal because

they constitute 'naked restrictions of trade.' White Motor Co. v. U.S., 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963). Even in the wake of Continental T. V. v. G.T.E. Sylvania, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977), agreements between a manufacturer and a distributor to terminate a competing discounting distributor have been held to be per se illegal. Cernuto, Inc. v. United Cabinet Corp., 47 L.W. 2614, ____ F. 2d ____ (3rd Cir. 1979). It is difficult to hypothesize a more naked restraint than the private unilateral power, reinforced by the regulatory and criminal apparatus of the state, to prohibit interstate trade outright.[3/]

"3. In Rice, this Court held that the distilled spirits fair trade

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3 cont.

laws were preempted by the federal anti-trust laws. Following Rice, the Court of Appeal in Midcal Aluminum, Inc. v. Rice, 90 Cal.App. 3d 979, ___ Cal. Rptr. ___ (1979), invalidated the wine fair trade and wholesale price posting statutes on the same ground. The U.S. Supreme Court has granted cert. in Midcal and will presumably review the preemption grounds of Rice. 48 U.S.L.W. 3217. The pendency of Midcal before the U.S. Supreme Court should not deter this Court from accepting and deciding the present petition now, since the petition is not based on the preemption grounds in Rice and Midcal but on three California State law grounds not considered in Rice and to which Rice and Midcal are totally irrelevant." (Pages 12-13)

FROM AMENDED PETITION FOR WRIT OF MANDATE

"Petitioners' constitutional rights will be violated if this statute is enforced against them. First, A.B. 499 improperly delegates to private parties the State's exclusive power to license the importation of alcoholic beverages into the State. It is not enough that an importer be licensed by the State. To import on any commercially significant scale, he must also be authorized to import a nationally advertised brand by one of the big distilling companies. Since the big distillers in substance have veto power over the licensing process, the statute delegates the power to regulate importation to the distillers. Such delegation violates Article 20, Section 22 of the

California Constitution and the 5th and 14th Amendments to the United States Constitution. See Memo, pp. 28-34. Third, the statute is preempted by the federal antitrust laws in that it purports to authorize and obliges the State to enforce privately imposed restrictions on interstate commerce which are violative of the Sherman Antitrust act. Specifically, A.B. 499 gives the big distilling interests the outright power to prohibit interstate movement of goods legally obtained by and belonging to others. The statute thus authorizes the most fundamental and unreasonable restraint on interstate commerce imaginable, i.e., the naked power to prohibit commerce by one's competitors. The statute further

California Constitution which expressly prohibits any delegation of the power to regulate the importation of alcoholic beverages. See attached Memorandum of Points and Authorities ("Memo"), pp. 20-28. Second, even in the absence of such an express constitutional provision prohibiting delegation, A.B. 499 would be an improper delegation since it fails to specify any standards for the exercise of the delegated power. Permission to import is committed to the unfettered discretion of the distillers with no procedure for reviewing their decisions. Accordingly, the statute denies petitioners both procedural and substantive due process in violation of Article 1, Section 7 of the

authorizes and condones a restraint on trade equivalent in restrictive power to a group boycott, which is per se illegal. (See Memo, pp. 12-13) Fourth, the statute deprives petitioners of the equal protection of the laws as guaranteed by Article 1, Section 7 of the California Constitution and the 14th Amendment to the United States Constitution by discriminating, without any rational basis, between importers who are "authorized" by the distillers and importers who are not. See Memo, pp. 34-42." (pages 12-13)

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Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

BOHEMIAN DISTRIBUTING COMPANY,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT.

JOINT APPENDIX

(Names and addresses of attorneys on inside cover.)

No. 80-1012 PETITION FOR CERTIORARI FILED DECEMBER 22, 1980.
Nos. 80-1030 and 80-1052 PETITIONS FOR CERTIORARI FILED DECEMBER 23, 1980.
CERTIORARI GRANTED NOVEMBER 30, 1981.

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JOINT APPENDIX

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Appendices to Petitions for Writ of Certiorari, filed with the United States Supreme Court, respectively, of Baxter Rice, Department of Alcoholic Beverage Control (No. 80-1012), of Wine & Spirits Wholesalers of California (No. 80-1052), and of Bohemian Distributing Co. (No. 80-1030). These Appendices have not been reprinted but are incorporated by reference and itemized herein.

1. List of Docket Entries in Case No. 3-CIV-19089, Court of Appeal of the State of California, Third Appellate District.

[Names and Addresses of Counsel for Parties and Amici Curiae Omitted in the Printing of this List of Docket Entries].

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation doing business as GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC. a California corporation; FREDERICA AULDRIDGE, doing business as SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE, doing business as TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY, doing business as HOUSE OF FINE SPIRITS,

Petitioners,

vs.

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenors,

BOHEMIAN DISTRIBUTING COMPANY,

Intervenor.

DATE	PROCEEDINGS
10/24/79	Filed petition for writ of mandate and/or prohibition and/or certiorari in Supreme Court.
10/31/79	Petition transferred by Supreme Court to 3 C.A.

1979

Nov. 1 Refiled above record in Court of Appeal, Third District. (effective date of statute (A.B. 499) is 1/1/80)

Nov. 14 Filed declaration and order respondent to 11/29/79.

Nov. 14 Filed association of attorneys for petitioner associating Thomas W. Martin, 926 J St., #1116, Sacramento with the Feldman firm.

Nov. 20 Filed petitioners' amended petition for writ of mandate and/or prohibition. (filed with permission of court)

Nov. 29 filed respondent's response to petition for writ of mandate and points and authorities in opposition to petition.

Nov. 29 Filed application of Wine & Spirits Wholesalers of California for leave to intervene and file complaint in intervention and COMPLAINT IN INTERVENTION. (See order dated 12/6/79 granting application.) (In support of respondent)

Nov. 29 Filed application of Bohemian Distributing Co. for leave to intervene in support of respondent ..... (See order dated 12/6/79 granting application.)

Dec. 6 By the Court:

The applications of Wine & Spirits Wholesalers of California and of Bohemian Distributing Co. for leave to file complaints in intervention in support of respondent are granted. Puglia, P. J. Dated: December 6, 1979

Dec. 6 Filed Bohemian Distributing Co.'s Complaint in Intervention.

Dec. 6 Filed Intervenor Bohemian Distributing Co.'s Memo in Opposition Petition for Writ of Mandate, etc.

Dec. 6 Filed Intervenor Wine & Spirits Wholesalers of California's Memo of points and authorities in Opposition to Petition for writ.

Dec. 4 Filed Application for leave to file, and extension of time to file response to complaints in intervention and to respondent's memorandum of points and authorities, & Order to 12/24/79. (Petitioner's)

Dec. 17 Filed request of Wine & Spirits Wholesalers of California that court defer decision on issuance of alternative writ and grant additional time to file additional points & authorities. Request denied, see letter.

Dec. 17 Filed respondent's Supplemental Points and Authorities in Support of Response to Petition.

Dec. 21 Received letter from intervenor Bohemian requesting that court delay acting until 12/28/79, so that they can file further memorandum in opposition.

Dec. 21 Filed Petitioners' Reply Memorandum of Points and Authorities in Support of Petition and Request for Stay of Enforcement and Exhibits to Petitioners' Reply Memorandum of Points and Authorities in Support of Petition and Request for Stay of Enforcement.

Dec. 24 FILED INTERVENOR BOHEMIAN DISTRIBUTING COMPANY'S MEMORANDUM IN OPPOSITION TO AMENDED PETITION FOR WRIT OF MANDATE AND/OR IN THE ALTERNATIVE PROHIBITION AND/OR CERTIORARI.

Dec. 24 FILED SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT. (WINE AND SPIRITS)

Dec. 27 Filed letter from petitioners' requesting response of intervenors' filed on December 24, 1979, be stricken.

Dec. 31 By the Court:

Let an alternative writ of mandate issue. Respondent's and intervenors' written returns are to be served and filed on or before January 21, 1980. Petitioners' replication, if any, is to be served and filed within 15 days after the filing of the returns.

It is further ordered that respondent Baxter Rice, Director, Department of Alcoholic Beverage Control, is to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672 as amended by Assembly Bill 499 effective January 1, 1980, pending filing of the returns and further order of this court.

Dated: December 31, 1979. Pugila, P. J.

Dec. 31 ISSUED ALTERNATIVE WRIT OF MANDATE WITH STAY.

1980.

Jan. 11 Filed application and order for permission to file Amici Curiae Brief in opposition to issuance of peremptory writ by The Distilled Spirits Council of the United States, Inc.

Jan. 11 FILED AMICI CURIAE BRIEF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

Jan. 11 Filed alternative writ of mandate and stay with proof of service.

Jan. 21 FILED INTERVENOR BOHEMIAN DISTRIBUTING COMPANY'S MEMORANDUM FILED CONCURRENTLY WITH RETURN ON ALTERNATIVE WRIT OF MANDATE IN OPPOSITION TO AMENDED PETITION FOR WRIT OF MANDATE AND/OR IN THE ALTERNATIVE, PROHIBITION AND/OR CERTIORARI. FILED DEMURRER OF INTERVENOR BOHEMIAN AND FILED ANSWER OF INTERVENOR BOHEMIAN.

Jan. 21 FILED RETURN OF INTERVENOR WINE & SPIRITS WHOLESALERS OF CALIFORNIA AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT.

Jan. 21 FILED MOTION OF INTERVENOR WINE & SPIRITS WHOLESALERS OF CALIFORNIA TO DISSOLVE TEMPORARY STAY ORDER; REQUEST FOR IMMEDIATE RELIEF PURSUANT TO SAID MOTION.

Jan. 21 Filed letter from respondent that the previous documents filed by them should be considered as the return.

Jan. 21 FILED PETITION FOR PERMISSION TO FILE A BRIEF AMICI CURIAE ON BEHALF OF THE WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND ORDER GRANTING PERMISSION TO FILE.

Jan. 21 FILED AMICI CURIAE BRIEF OF THE WINE AND SPIRITS WHOLESALERS OF AMERICA, INC.

1980

Jan. 22 FILED PETITION FOR PERMISSION TO FILE A BRIEF AMICI CURIAE ON BEHALF OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, HELPERS OF AMERICA, LOCAL 595, IN OPPOSITION TO ISSUANCE OF A PEREMPTORY WRIT AND ORDER GRANTING PERMISSION TO FILE.

Jan. 22. FILED BRIEF AMICI CURIAE ON BEHALF OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc.

Jan. 23 Filed petitioners' letter opposition to motion to dissolve the temporary stay.

Jan. 28 Filed Attorney General's letter joining in motion to dissolve temporary stay order and request for immediate relief.

Jan. 29 Filed petitioners' letter in response to respondent's request to dissolve temporary stay.

Jan. 31 Filed declaration of Sante Quattrin in support of motion to dissolve stay order, Wine & Spirits Wholesalers of California.

Jan. 31 Received letter from Wine & Spirits Wholesalers of California regarding the filing of points and authorities in reply to opposition.

Feb. 4 Filed Wine & Spirits Wholesalers of California memorandum of points and authorities in reply to opposition by petitioners to motion to dissolve stay order.

Feb. 4 Filed letter from petitioner regarding additional material filed by Wine & Spirits Wholesalers of California, etc.

Feb. 5 Filed Bohemian Distributing Company's Motion to Dissolve Temporary Stay Order, P&A.

Feb. 5	Filed Petitioner's Replication and memordandum in support.
Feb. 8	Filed Petitioner's Memorandum in Opposition to Motion to Dissolve Stay.
Feb. 14	By the Court: The motions of the intervenors to dissolve temporary stay are denied. Dated: February 14, 1980 Puglia, P.J.
Feb. 20	1980 CAUSE ORDERED ON May 21 '80 CALENDAR AT 9:30 A.M.
April 7	Filed application and order of Consumers Union of United States, Inc., West Coast Regional Office for leave to file a brief amicus curiae in support of petitioners.
April 7	FILED BRIEF OF AMICUS CURIAE CONSUMERS UNION OF UNITED STATES, INC.
April 21	FILED APPENDICES TO AMICUS CURIAE BRIEF OF CONSUMERS UNION.
April 18	Filed petition of Wine & Spirits Wholesalers of America to present oral argument as amici curiae. (filed by Heller firm)
April 18	Filed letter of White & Case requesting permission to present oral argument as amicus curiae on behalf of Wine & Spirits Wholesalers of America. (filed by White & Case).
April 21	Filed Intervenor Wine & Spirits Wholesalers of California's letter requesting 30 minutes for oral argument.
April 23	Filed Intervenor Bohemian Dist. Co's letter requesting 30 minutes for oral argument.

April 22	Filed petitioners' opposition to amicus curiae's request for oral argument and intervenors' request for more than 15 minutes for oral argument.
April 23	Filed intervenor Bohemian Distributing Co's. letter citing case of Calif. Retail Liquor Dealers Assn. v. Midcal Aluminum.
April 25	Filed letter from Wine & Spirits Wholesalers of California discussing Midcal Aluminum case.
April 25	Filed letter from petitioners commenting on Midcal Aluminum Case.
May 1	Filed petitioners' response to Wine & Spirits Wholesalers of California's letter of April 25, 1980.
May 5	Filed letter from petitioners and intervenors and letter from respondent requesting 1 hour for oral argument by petitioners and intervenors and 15 minutes by respondent.
May 5	Filed respondent's supplemental letter brief.
May 9	Filed Intervenors' Motion to Strike and Motion to Exclude Evidence and Memorandum of Points and Authorities in Support Thereof and Appendix.
May 12	Filed petitioners' letter dated May 9, 1980 commenting on Mid-Cal decision.
May 15	Filed petrs' letter commenting on time allotted for oral argument and requesting one-half hour for each side.
May 16	Filed petitioners opposition to intervenors' motion to exclude evidence.

May 21 Cause called. Messrs. George Weickhardt, Thomas Martin and Harry M. Snyder appeared for petitioners. Mr. Weickhardt argued. Mr. Snyder argued. Mr. Martin argued. Messrs. George Ball and Frank Rothman appeared for intervenors.

Mr. Ball argued. Mr. Rothman argued. Mr. George Roth, Deputy Attorney General, argued for respondent. Cause submitted.

July 17 Let a peremptory writ of mandate issue ordering respondent to refrain from enforcing that portion of Business and Professions Code section 23672 which provides: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." (*CERTIFIED FOR PUBLICATION.*)

REYNOSO, J.

We concur: Puglia, P. J.
Evans, J.

8/26/80 Respondent filed for hearing in Supreme Court.

8/28/80 Intervenor (Bohemian) for hearing in Supreme Ct.

8/29/80 Rec'd. copy of petition for hearing of Wine & Spirits Wholesalers.

9/5/80 Supreme court extended time to grant or deny until 10/15/80 or until they act.

9/8/80 Rec'd answer to petition.

9/24/80 HEARING DENIED BY SUPREME COURT, J. Manuel is of the opinion that the petition should be granted.

Sept. 25	Issued peremptory writ of mandate.
12/22/80	Received copy of Petitioner's Petition for Writ of Certiorari in U.S.S.Ct. (Rice)
12/24/80	Received copy of Wine & Spirit's Petition for Writ of Certiorari in U.S.S.Ct.
12/29/80	Received copy of petition for writ of certiorari filed by Bohemian Dist.
12/8/81	Filed U.S.S.Ct. orders grant writ of certiorari in above case.

2. List of Docket Entries in Case S.F. No. 24082, Supreme Court of the State of California.

[Material Omitted in Printing Is Identical to the Court of Appeal Docket Sheet Entries]

DATE	PROCEEDINGS
8/26/80	Filed Respondent's Motion for Hearing Due 9/15/80
8/26/80	Filed Real Party in Interest's Bohemian Petition for Hearing Due 9/15/80
8/26/80	Filed Real Party in Interest's Wine & Spirits Petition for Hearing Due 9/15/80
9/05/80	Filed Petitioners Answer to Petition
9/05/80	Time for Granting or Denying Hearing Extended to 10/15/80 (Etc.)
9/24/80	Hearing Denied Manuel J. of The Opinion That the Petition Should Be Granted
	Cert. to U.S.S.C. 80-1012 80-1030 80-1052

3. Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari [C.C.P. 1068; 1069; 1085; 1086; 1102; 1103; B. & P. C. § 23090.5; California Rules of Court, Rule 56], Filed November 20, 1979, in California Court of Appeal.

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

No. 3-CIV-19089

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS

Petitioners,

vs.

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent.

Petitioners NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS, petition this Court for a writ of mandate and/or, in the alternative, prohibition and/or certiorari ordering Respondent BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, to refrain and desist from enforcing A.B. 499, an unconstitutional statute which will prohibit importation of distilled spirits without the permission of the brand owner.

A.B. 499 amends Business and Professions Code § 23672 to read as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as ~~the~~ *an* authorized importer of such brand by the ~~licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755~~ *brand owner or his authorized agent*. Such distilled spirits imported into California shall come to rest at the warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

The amended version of the statute will become effective on January 1, 1980.

A.B. 499 empowers the big out-of-state distilling companies to dictate who may import liquor into California.

Since the statute will allow the distillers to exclude competition to their franchised distributors, it will also enable them to control wholesale prices. Approximately 90% of the distilled spirits consumed in California are nationally advertised brands produced by large out-of-state distilling companies. These nationally advertised brands are distributed in California through a highly concentrated network of franchised distributors: 6 distributors in the Los Angeles area and 6 in the Bay Area handle approximately 70% of the wholesale volume in the State. These franchised distributors rigorously adhere to artificially high resale prices "suggested" by the distillers.

Under current law the wholesaler petitioners, who are non-franchised or "independent" wholesalers, may import major brand liquor purchased in other states without the permission of the brand owners. Petitioners presently sell this liquor to retailers at prices significantly below the artificially inflated "suggested" prices prescribed by the distillers. A.B. 499 will allow the big distillers to forbid the petitioners to import nationally advertised brands and will thus destroy price competition at the wholesale level. In fact, the big distillers have already refused to give the petitioners permission to import their brands. The statute will thus mean that the state will be locked into a system of distribution parcelled out among a few favorites of the distillers who have proven themselves ready to comply with the high "suggested" prices. The statute, in short, means artificially inflated liquor prices at the wholesale and, consequently, the retail level.

The statute is unconstitutional on its face on four grounds: (1) it delegates the power to regulate importation of liquor in violation of an express prohibition on such delegation in the State Constitution; (2) it deprives petitioners of due

process; [(3) *it is inconsistent with and preempted by the Federal antitrust laws*;] and (4) it denies petitioners equal protection of the laws.

1. *Beneficial Interest of Petitioners*

Petitioners NORMAN WILLIAMS COMPANY, SCHWAB DISTRIBUTING COMPANY, INC. and LEWIS-WESTCO & CO. are, and at all times mentioned in this petition have been, distilled spirits importers and wholesalers duly licensed by the State of California to import distilled spirits into California pursuant to Business & Professions Code Sections 23374.5 and 23378. Pursuant to their respective licenses, said petitioners are each presently engaged in the importation of distilled spirits into California from other states. Petitioners GREENE CAT LIQUORS ("GREENE CAT"), INC., FREDERICA AULDRIDGE ("AULDRIDGE"), RALPH E. PIERCE & SHARON L. PIERCE ("PIERCE") and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY ("KIRBY") are each retailers and holders of an off-sale retailer's license for distilled spirits; GREENE CAT, AULDRIDGE, PIERCE and KIRBY each currently have monthly gross sales of distilled spirits of under $17,000 and obtain supplies from time to time from one or more of the wholesaler petitioners.

The wholesaler petitioners have already sought and been refused authorization from the major distillers to act as importers of their brands under A.B. 499. Enforcement of the statute will thus foreclose the wholesaler petitioners' right to import into California any of the major brands of distilled spirits (which constitute 90% of California consumption) and prevent the retailer petitioners from obtaining distilled spirits from the wholesaler petitioners at discount prices. Therefore, all petitioners are within the class of persons beneficially interested in staying the enforcement by

Respondent of Business & Professions Code § 23672 as amended by Assembly Bill 499 prior to its effective date of January 1, 1980.

2. *Capacity of Respondent*

Respondent BAXTER RICE is the duly appointed Director of the Department of Alcoholic Beverage Control charged by law with administering and enforcing the provisions of the Alcoholic Beverage Control Act (Business & Professions Code §§ 23000 *et seq.*). Accordingly, beginning January 1, 1980, Respondent is required to enforce Business & Professions Code § 23672 as amended by Assembly Bill 499.

3. *Statement of Facts*

The great bulk of distilled spirits consumed in California (except brandies) are produced outside the state and must be imported. The industry of distilling and distributing distilled spirits in the United States, including California, is relatively concentrated, and in California there is very little intrabrand price competition at the wholesale level.

The six largest distillers — Seagram, National Distillers, Heublein, Hiram Walker, Schenley and Brown-Forman, respectively — control the production and distribution of approximately 60% of all distilled spirits consumed in the United States. The next nine largest distillers — Bacardi, Fleischmann, Somerset, Gordon/Renfield, Jim Beam, Glenmore, Liggett, Buckingham, and Foremost-McKesson, respectively — control another 25% of the market. See Exhibit A-1 which is a true and correct copy of "1978's Gainers and Losers in the Liquor Business," *Business Week*, 4-2-79, p. 92; Exhibits A-2 through A-4 respectively are true and correct copies of pp. 50, 54 and 131 of *The Liquor Handbook 1979*, Gavin Johnson Associates; Exhibit A-5 is

a true and correct copy of *Barron's*, March 6, 1978, pp. 9-14. These publications are standard industry sources for market data. These 15 companies plus several others market nationally advertised brands of distilled spirits. Nationally advertised brands account for approximately 90% of California consumption. The remaining 10% consists of numerous small "private label" brands which are not nationally advertised. See Exhs. A and B.

On May 30, 1978, this Court, in *Rice v. A.B.C. Appeals Bd.*, 21 Cal. 3d 431, 146 Cal. Rptr. 585 (1978) invalidated California's liquor fair trade laws as inconsistent with and preempted by the Sherman Antitrust Act. Prior to this decision, Business & Professions Code § 23672 prohibited a duly licensed distilled spirits importer from importing into California any brand of distilled spirits unless such importer was designated as an "authorized importer" by the party who filed the minimum retail price schedule for the brand, i.e. the brand owner. Petitioners had never been designated by any major brand owner as an "authorized importer" and, as a consequence, were completely barred from importing major brand liquor into California.

After *Rice* invalidated § 23672 as it was then phrased, duly licensed distilled spirits importers have been free to import nationally advertised brands of distilled spirits even if they have not been designated as an "authorized importer" by the brand owner. Accordingly, the wholesaler petitioners herein began purchasing nationally advertised brands of distilled spirits from jobbers in the State of Oklahoma, where distillers and jobbers are required by Oklahoma law to sell their brands without discrimination to all licensed wholesalers. Petitioners have been importing these spirits into California and reselling to retailers at prices significantly below the prices at which the authorized or franchised distributors sell to the retailers. (See Exhs. D,

E, G.) California *retail* liquor prices which before Rice were the highest in the country, *Rice, supra*, 21 Cal. 3d at 455, have now fallen tc level below the national average. See Exhibit A-4. Independent (non-franchised) wholesalers like petitioners now handle about ten to fifteen percent of the volume of major distilled spirits distributed in the State. See Exhibit B, which is a true and correct copy of Monthly Reports of the California State Board of Equalization for distilled spirits excise tax payments. The independent wholesalers currently sell distilled spirits imported from Oklahoma to both large discount retailers and small family-owned retailers, such as the retailer petitioners herein.

Unlike the independent wholesalers, the authorized or franchised distributors of the distillers are supplied directly by the distillers. The franchised distributors are generally much larger than the independent distributors and control approximately 85% of the distilled spirits wholesale volume in California. (See Exhibit B.) In each major marketing area in California, each distiller usually has only one or two franchised distributors. Since the distilling industry is concentrated, the practice of distributing through only one or two franchised distributors likewise results in concentration at the wholesale level in California. Thus six major franchised distributors in Southern California (NDC, Bohemian-Don W. Snyder-Western, William George-Young's Market, Simon Levi, Southern Wines & Spirits, and Drummond Distributing), six in Northern California (Rathjen, Foremost-McKesson, Juilliard, Sobel, Terminal and Joseph George), and one in the Central Valley (Berberian) account for approximately 70% of wholesale volume in the State (see Exhibit B). Under his franchise agreement, each franchisee is also confined to a particular marketing area.

The major distillers promulgate to their franchisees lists of "suggested" prices for resale to the retailer. Exhibit C

is a collection of documents which petitioners are informed and believe are typical suggested price circulars. The franchised distributors rigorously adhere to the suggested retail prices to within a few cents per case. Thus at present and for many years past wholesale prices on each brand have been uniform among the various franchisees. See Exhibit D which is a true and correct copy of 39 *Patterson's California Beverage Journal* 281A-316A (No. 1, Sept. 1979). This periodical is a standard industry source for price data. All franchised distributors use the base or "front line" prices indicated in this exhibit which are, in fact, the current suggested prices. For example, Exhibit E, which is a true and correct copy of excerpts from 39 *Patterson's California Beverage Journal* (No. 1, Sept. 1979) and *Beverage Industry News Merchandiser* (Sept. 1979), demonstrates that for the ten leading brands indicated in Exhibit A-1, the franchised distributors sell at virtually identical front line prices and exactly the same volume discounts.

The only true price competition at the wholesale level comes from independent wholesalers like petitioners who sell to retailers at prices significantly below the distillers' suggested prices. The cost to the independent wholesalers is several dollars per case above that paid by the franchisees (because of the Oklahoma jobber's markup and additional freight). The independents must also pay cash while the franchisees are generally given liberal credit terms by the distillers. Despite this higher cost per case, the independents sell cases to the retailers at a net price which is $2.00 to $10.00 below the suggested prices charged by the franchisees. Exhs. D, E & G. Exhibit G is a true and correct copy of Petitioner Norman Williams Co.'s price postings. Price competition from the independents has produced a reduction in the "suggested" wholesale prices over the last year in many fast-moving brands.

After A.B. 499 was passed by the legislature, petitioners sought and were refused authorization from the major distillers to import their brands of distilled spirits. See Exhibit F, which is a true and correct copy of letters by wholesaler petitioners to the major distillers and rejections received in reply. Accordingly, petitioners will be foreclosed, beginning January 1, 1980, from importing major nationally advertised brands of liquor, in other words, substantially the entire market.

Exclusion of petitioners from the importation of major brand distilled spirts will have the effect of limiting importation to the presently franchised distributors. Since these distributors all adhere to the resale prices suggested by the distillers and since petitioners are the only importers which compete in price, A.B. 499 will result in the elimination of intrabrand price competition at the wholesale level. Retailers' costs will go up since they will only be able to obtain liquor at the suggested prices.

4. *Basis for Relief*

Unless this Court restrains and prohibits Respondent from enforcing AB 499, Respondent will have a clear and mandatory duty to enforce this unconstitutional statute on January 1, 1980. Since the major distillers have refused to give petitioners permission to import, Respondent will be obliged to commence disciplinary proceedings against petitioners if they continue to import.

Petitioners' constitutional rights will be violated if this statute is enforced against them. First, A.B. 499 improperly delegates to private parties the State's exclusive power to license the importation of alcoholic beverages into the State. It is not enough that an importer be licensed by the State. To import on any commercially significant scale, he must also be authorized to import a nationally advertised brand

by one of the big distilling companies. Since the big distillers in substance have veto power over the licensing process, the statute delegates the power to regulate importation to the distillers. Such delegation violates Article 20, Section 22 of the California Constitution which expressly prohibits any delegation of the power to regulate the importation of alcoholic beverages. See attached Memorandum of Points and Authorities ("Memo"), pp. 20-28. Second, even in the absence of such an express constitutional provision prohibiting delegation, A.B. 499 would be an improper delegation since it fails to specify any standards for the exercise of the delegated power. Permission to import is committed to the unfettered discretion of the distillers with no procedure for reviewing their decisions. Accordingly, the statute denies petitioners both procedural and substantive due process in violation of Article 1, Section 7 of the California Constitution and the 5th and 14th Amendments to the United States Constitution. See Memo, pp. 28-34.

Third, the statute is preempted by the federal antitrust laws in that it purports to authorize and obliges the State to enforce privately imposed restrictions on interstate commerce which are violative of the Sherman Antitrust act. Specifically, A.B. 499 gives the big distilling interests the outright power to prohibit interstate movement of goods legally obtained by and belonging to others. The statute thus authorizes the most fundamental and unreasonable restraint on interstate commerce imaginable, i.e., the naked power to prohibit commerce by one's competitors. The statute further authorizes and condones a restraint on trade equivalent in restrictive power to a group boycott, which is *per se* illegal. (See Memo, pp. 12-13)

Fourth, the statute deprives petitioners of the equal protection of the laws as guaranteed by Article 1, Section 7 of the California Constitution and the 14th Amendment to the

United States Constitution by discriminating, without any rational basis, between importers who are "authorized" by the distillers and importers who are not. See Memo, pp. 34-42.

Petitioners have a clear, present, and substantial right to stay Respondent's enforcement of Business & Professions Code § 23672 as amended by Assembly Bill 499 prior to its effective date of January 1, 1980 because the statute, as amended, is unconstitutional on its face and petitioners have already been refused authorization to act as "authorized importers". It is therefore unnecessary for this Court to wait to determine how the statute is enforced.

5. *Inadequacy of Other Remedies*

Petitioners have no adequate administrative remedy or remedy at law. To require petitioners to violate the statute and face administrative and possible criminal sanctions to test its validity does not afford petitioners an adequate administrative or legal remedy. Petitioners have, moreover, already sought and been refused authorization from the major distillers to act as importers of their brands. The statute provides them with no administrative remedy for review of this private action.

Administrative proceedings before Respondent for violation of the statute will not afford petitioners an adequate remedy because the state Constitution prohibits an administrative officer such as Respondent from declaring a statute unenforceable or refusing to enforce it on the basis of unconstitutionality unless an appellate court has first made a determination that such statute is unconstitutional. Constitution Article 3, § 3.5. Accordingly if a petitioner violates A.B. 499 in a test case to determine its constitutionality, he would be subjected to license revocation proceedings before an administrative body which is powerless to deter-

mine the constitutionality of the statute. Respondent could do nothing but impose a penalty for violation of the statute.

Neither would the petitioners have a remedy before the Alcoholic Beverage Control Appeals Board, which has already taken the position that Article 3, § 3.5 deprives it of the power to declare a statute unconstitutional. *Capiscean Corporation v. Alcoholic Beverage Control Appeals Board,* 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979).

Requiring petitioners first to violate the statute to test its validity may also expose them to possible criminal sanctions. Under Business & Professions Code § 23670, violation of Business & Professions Code § 23672 (which A.B. 499 amends) is a misdemeanor. Under Business & Professions Code § 25617, each violation is punishable by a fine of not more than $500.00 or by imprisonment in the county jail for not more than six months or by both. Goods imported in violation of the statute may also be subject to the extremely costly penalty of confiscation by Respondent. Business & Professions Code § 25350.

6. *Irreparable Damage Threatened*

As a result of the threatened future actions of Respondent as described above, petitioners will sustain irreparable damage to their businesses and business relationships unless Respondent is restrained by this Court. Enforcement of Business & Professions Code § 23672 as amended by Assembly Bill 499 would destroy petitioners' businesses and business relationships with out-of-state suppliers, destroy a chain of distribution established by the petitioners, and effectively exclude petitioners from substantially all of the packaged distilled spirits importing and wholesaling market.

7. *Reason For Original Application to Higher Court*

In accordance with California Rules of Court 56(a)(1), petitioners seek extraordinary relief from this Court in the first instance because, in addition to the matters set out above in Paragraphs 1 through 6, the following circumstances render it proper and necessary that a writ issue from this Court:

The constitutionality of a statute of statewide effect is involved. The enforcement of the statute is likely to have an immediate adverse effect on the public welfare statewide because the predictable result of the statute, in eliminating petitioners from the importation of major brand distilled spirits, is an abrupt raising of prices which consumers throughout the State must pay for alcoholic beverages. If this matter is not resolved prior to the effective date of the statute (January 1, 1980), consumers will be forced to pay these inflated prices over the entire period of protracted litigation required to resolve the constitutionality of this statute in the lower courts. This matter therefore involves significant public issues which require prompt resolution.

Enforcement of the statute commencing January 1, 1980 will also jeopardize businesses and business relationships established by petitioners and others which are largely responsible for a lowering of liquor prices throughout the State over the last year since this Court's decision in *Rice*. The wholesaler petitioners in this action, who could not engage in the importation of major brand liquor prior to the *Rice* decision, have established valuable business relationships not only with suppliers of liquor in Oklahoma but also with numerous retailers in California. Enforcement of the statute would destroy their businesses and disrupt a whole chain of distribution which may not easily be set up again.

A trial on the facts in a lower court is unnecessary for the resolution of the issues presented. As demonstrated above, A.B. 499 is unconstitutional on its face. In particular, the improper delegation, deprivation of due process and equal protection attacks on the statute can be resolved in petitioners' favor merely by reference to well established legal authorities. Furthermore, this Court has already evaluated and rejected in *Rice, supra,* the numerous factual arguments based on the erroneous premise that high liquor prices are beneficial to the public welfare.

The matters involved herein raise issues which are likely to recur and should receive uniform resolution throughout the State.

WHEREFORE, petitioners pray that:

1. An alternative writ of mandate and/or prohibition and/or certiorari issue under the seal of this Court commanding respondent BAXTER RICE, Director, Department of Alcoholic Beverage Control, to desist and refrain from taking any action or proceedings to enforce Business & Professions Code § 23672 as amended by Assembly Bill 499 until further order of this Court, and directing and requiring respondent to show cause before this Court, at a time and place then or thereafter specified by Court order, why he should not be absolutely and forever restrained from enforcing § 23672 as amended by A.B. 499 or to show cause before this Court at a time and place then or thereafter specified, why a peremptory writ should not issue.

2. On the return of the alternative writ and the hearing of this petition, this Court issue its peremptory writ of mandate and/or prohibition and/or certiorari absolutely and forever restraining respondent from enforcing Business & Professions Code § 23672 as amended by Assembly Bill 499.

3. Petitioners recover costs and attorneys' fees in this action.

4. The Court grant such other relief as is just and proper.

Dated: November 15, 1979.

Respectfully submitted,

FELDMAN, WALDMAN & KLINE

By /s George G. Weickhardt

George G. Weickhardt

Attorneys for Petitioners

EXHIBIT A

4. Of Exhibits in Support of Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari, with Supporting Memorandum of Points and Authorities, Refiled November 1, 1979, in California Court of Appeal after Transfer from Supreme Court of California.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Civil Case No. 24082

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, FR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS

Petitioners,

vs.

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent.

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EXHIBIT A

By computation of brand totals from A-5, it can be determined that Seagram, National, Schenley, Heublein, Hiram Walker, and Brown-Forman accounted for 60% of total national consumption in 1977 of approximately 158,000,000-161,000,000 cases (from Exhibit A-2 to A-3). The following national ranks and market shares were also derived from Exhibit A-5.

Rank	Company	Estimated Market Share
1	Seagram	19.9%
2	Heublein	10.0
3	Hiram Walker*	9.0
4	National Distillers	8.8
5	Schenley	8.1
6	Brown-Forman**	4.8
7	Bacardi	4.0
8	Fleischmann***	3.7
9	Somerset	3.4
10	Gordon/Renfield	3.0
11	Jim Beam	2.8
12	Glenmore	2.6
13	Ligett Group	2.4
14	Buckingham	1.6
15	Foremost-McKesson	1.0
		85.1%

* includes assigned agency brands
** includes Southern Comfort acquisition
*** includes Inver House acquisition

It can also be determined from Exhibit A-5 that nationally advertised brands produced by eleven other companies account for an additional 8,962,000 cases or approximately an additional six percent (6%) of national consumption. Nationally advertised brands accordingly account for approximately 91% of national consumption.

1978's gainers and losers in the liquor business

	Brand	Sales (thousands of cases) 1978	1977	Change Percent	Marketer	Type
1	Bacardi	6,200	5,000	24.%	Bacardi	Rum
	Seagram's 7 Crown	6,200	6,300	–1.6	Seagram	Blend
3	Smirnoff	6,150	5,875	4.7	Heublein	Vodka
4	Seagram's VO	3,875	3,775	2.8	Seagram	Canadian
5	Canadian Club	3,675	3,850	.07	Walker	Canadian
6	Jim Beam	2,750	2,675	2.8	Beam	Bourbon
7	J&B	2,650	2,525	5.0	Paddington	Scotch
8	Gordon's Gin	2,600	2,700	–3.7	Renfield	Gin
9	Windsor Supreme	2,475	2,375	4.2	National	Canadian
10	Seagram's Gin	2,350	2,050	14.6	Seagram	Gin
11	Canadian Mist	2,300	2,000	15.0	Brown-Forman	Canadian
12	Popov	2,250	1,825	23.3	Heublein	Vodka
13	Gilbey's Gin	2,225	2,175	2.3	National	Gin
14	Dewar's	2,200	2,150	2.3	Schenley	Scotch
15	Cutty Sark	2,150	2,100	2.4	Buckingham	Scotch
16	Black Velvet	1,900	1,575	20.6	Heublein	Canadian
17	Jack Daniel's	1,875	1,525	23.0	Brown-Forman	Tennessee
18	Early Times	1,800	1,750	2.9	Brown-Forman	Bourbon
19	Kessler	1,725	1,800	–4.2	Seagram	Blend
20	Ancient Age	1,675	1,775	–5.8	Schenley	Bourbon
	Johnnie Walker Red	1,675	1,550	8.1	Somerset	Scotch
22	Gordon's Vodka	1,650	1,625	1.6	Renfield	Vodka
23	Christian Bros.	1,575	1,550	1.8	Fromm & Sichel	Brandy
24	Beefeater	1,550	1,425	8.8	Kobrand	Gin
25	Calvert Extra	1,475	1,600	–7.8	Seagram	Blend
	Ten High	1,475	1,425	3.5	Walker	Bourbon
27	Gilbey's Vodka	1,400	1,350	3.7	National	Vodka
28	Fleischmann's Gin	1,375	1,350	1.9	Fleischmann	Gin
29	Imperial	1,175	1,225	–4.1	Walker	Blend
	Wolfschmidt	1,175	1,225	–4.1	Seagram	Vodka
31	Kamchatka	1,150	1,000	15.0	National	Vodka
	Southern Comfort	1,150	1,025	12.2	Brown-Forman	Specialty
33	Kahlua	1,100	850	29.4	Walker	Specialty
34	Fleischmann's Pref'd	1,075	1,175	–8.5	Fleischmann	Blend
	Old Crow	1,075	1,050	2.4	National	Bourbon
39	Chivas Regal	1,050	1,000	5.0	Seagram	Scotch
	Old Grand-Dad	1,050	1,025	2.4	National	Bourbon

38	Lord Calvert Canadian	1,000	925	8.1	Seagram	Canadian
39	Crown Russe	875	950	–7.0	Seagram	Vodka
40	Schenley Vodka	825	950	–13.2	Schenley	Vodka
41	MacNaughton's	800	775	3.2	Schenley	Canadian
	Relska	800	875	–8.8	Heublein	Vodka
43	Old Charter	775	825	–6.1	Schenley	Bourbon
	Old Forester	775	725	6.9	Brown-Forman	Bourbon
45	Old Taylor	675	725	–8.9	National	Bourbon
	Ronrico	675	600	12.5	Seagram	Rum
47	Tanqueray	700	600	16.0	Somerset	Gin
48	Inver House	650	600	8.3	Publicker	Scotch
49	Jose Cuervo	625	575	8.7	Heublein	Tequila
	Skol	625	500	25.0	Publicker	Vodka
51	Walker Vodka	600	525	4.3	Walker	Vodka
	Amaretto Di Saronno	500	—	—	Glenmore	Specialty
53	Johnnie Walker Black	450	525	14.8	Somerset	Scotch
	Nikolai	850	600	–8.3	Seagram	Vodka
	Crown Royal	550	600	10.0	Seagram	Canadian
56	Castillo	525	—	—	Bacardi	Rum
	Canadian LTD	525	—	—	Fleischmann	Canadian
	J. W. Dant	525	600	–12.5	Schenley	Bourbon
	Jacquin	525	—	—	Jacquin	Vodka
	Mr. Boston	525	625	–16.0	Glenmore	Vodka
	Tvarsoki	525	575	–8.7	American	Vodka
	Wild Turkey	525	—	—	Austin-Nichols	Bourbon
63	Ballantine	500	500	—	21 Brands	Scotch
	Passport	500	575	–13.0	Seagram	Scotch

Business Week April 2, 1979

Consumption of Total Distilled Spirits — 1971 to 1978 (In Cases)* Calendar Years

Region	1971	1972	1973	1974	1975	1976	1977	1978
N.E.	10,740,553	11,163,746	11,504,419	11,682,953	11,567,041	11,413,866	11,536,118	11,713,478
Me.	610,362	649,128	674,564	714,047	721,193	761,856	803,218	830,099
N.H.	1,413,086	1,522,559	1,564,388	1,549,879	1,629,861	1,612,936	1,702,365	1,761,635
Vt.	507,790	556,328	567,295	567,824	574,635	564,033	537,428	552,553
Mass.	4,866,688	5,046,133	5,296,057	5,414,245	5,248,961	5,128,854	5,118,540	5,201,489
R.I.	571,257	698,694	721,720	738,684	746,773	729,625	721,308	713,113
Conn.	2,671,370	2,690,904	2,680,395	2,698,274	2,645,618	2,616,562	2,653,259	2,654,589
M.A.	28,730,318	28,076,189	28,974,331	28,668,518	28,341,595	27,967,677	27,649,864	27,446,823
N.Y.	16,193,513	15,225,398	16,147,341	15,888,768	15,688,912	15,436,114	15,127,680	14,990,845
N.J.	6,096,749	6,323,167	6,182,127	6,117,564	5,982,590	5,888,982	5,888,394	5,805,130
Pa.	6,440,056	6,527,624	6,644,863	6,662,186	6,670,093	6,642,581	6,633,790	6,650,848
E.N.C.	26,229,489	27,179,503	27,550,312	27,911,255	27,963,247	27,711,849	28,277,377	28,590,316
Ohio	5,491,749	5,561,245	5,692,002	5,702,610	5,619,118	5,544,416	5,641,687	5,754,932
Ind.	2,170,942	2,336,935	2,299,803	2,428,037	2,452,975	2,479,759	2,871,218	2,814,553
Ill.	9,280,887	9,449,306	9,585,559	9,602,787	9,756,427	9,492,947	9,341,848	9,185,159
Mich.	6,087,471	6,408,322	6,457,175	6,578,254	6,587,509	6,684,350	6,784,135	7,059,700
Wis.	3,198,440	3,423,695	3,515,773	3,599,567	3,547,218	3,510,377	3,638,489	3,775,973
W.N.C.	9,273,434	9,417,705	9,546,080	9,996,358	9,981,884	9,574,916	9,685,956	9,905,149
Minn.	2,682,330	2,578,932	2,717,740	2,800,969	2,742,116	2,544,669	2,550,657	2,541,841
Ia.	1,301,299	1,332,782	1,420,413	1,480,109	1,521,998	1,557,127	1,581,852	1,583,234
Mo.	2,680,008	2,750,056	2,566,442	2,762,557	2,720,451	2,506,723	2,511,656	2,674,840
N.D.	399,511	468,183	475,396	492,608	509,628	499,994	500,915	508,810
S.D.	372,625	365,255	419,784	420,868	429,047	456,744	486,086	483,877
Neb.	886,656	934,413	919,578	952,183	973,450	933,807	946,078	952,682
Kan.	951,005	988,084	1,026,727	1,087,064	1,085,194	1,075,852	1,108,712	1,159,865
S.A.	24,274,908	25,598,037	25,656,356	26,731,786	26,914,140	27,808,670	28,265,910	29,454,395
Del.	582,437	540,047	555,437	544,661	546,946	480,425	546,994	555,015
Md.	3,493,436	3,658,893	3,771,608	3,894,866	3,993,221	4,029,432	4,056,806	4,086,513
D.C.	2,118,925	2,061,923	1,908,025	1,822,068	1,782,995	1,695,551	1,572,649	1,502,792
Va.	2,975,862	3,068,071	3,197,431	3,220,926	3,234,489	3,266,696	3,371,235	3,506,707
W.Va.	835,751	870,158	897,850	938,583	997,609	1,013,325	1,032,419	1,048,972
N.C.	2,845,724	2,919,045	2,981,838	3,046,791	3,068,800	3,144,330	3,217,572	3,373,843
S.C.	1,742,299	1,900,284	1,943,772	2,118,086	2,070,411	2,182,863	2,141,659	2,388,802
Ga.	2,912,775	3,204,157	2,983,402	3,233,465	3,490,756	3,761,324	3,782,140	4,013,760
Fla.	6,767,699	7,375,459	7,416,993	7,912,340	7,728,913	8,234,724	8,544,436	8,977,991
E.S.C.	5,570,941	6,004,737	6,311,675	6,575,142	6,876,080	7,070,142	7,319,975	7,626,119
Ky.	1,607,098	1,666,207	1,705,135	1,748,813	1,787,234	1,771,136	1,808,027	1,822,564
Tenn.	1,414,382	1,580,012	1,746,271	1,822,651	1,905,960	1,997,993	2,044,056	2,131,162
Ala.	1,541,228	1,672,334	1,730,860	1,794,19[illegible]	1,908,871	1,966,216	2,053,498	2,167,003
Miss.	1,008,233	1,086,184	1,129,409	1,209,484	1,274,015	1,334,797	1,414,394	1,505,390

W.S.C.	9,669,807	9,755,062	10,048,464	10,482,433	11,401,667	11,487,363	12,389,613	13,881,300
Ark.	661,189	727,429	790,733	847,538	850,834	911,461	912,618	1,079,677
La.	2,304,928	2,361,116	2,302,995	2,331,714	2,690,745	2,758,307	2,927,731	3,235,001
Tex.	5,394,022	5,414,083	5,579,201	5,954,308	6,406,492	6,371,640	7,044,567	7,911,062
Okla.	1,309,668	1,252,434	1,375,535	1,348,873	1,453,596	1,445,955	1,504,697	1,655,560
M.	5,657,414	6,058,627	6,432,607	6,908,536	7,172,689	7,803,908	8,097,904	8,319,178
Mont.	460,805	490,478	512,006	533,433	555,796	572,178	606,986	613,838
Ida.	367,223	386,476	388,602	415,560	443,247	450.940	483,499	514,159
Wyo.	250,480	267,645	290,933	318,306	336,646	350,964	382,251	414,396
Colo.	1,620,586	1,720,131	1,852,967	1,980,700	2,036,928	2,363,203	2,182,136	2,215,458
N.M.	546,089	539,919	498,274	563,465	488,928	637,813	730,595	742,380
Ariz.	1,079,169	1,128,475	1,227,550	1,372,749	1,391,430	1,421,260	1,558,053	1,623,830
Utah	380,160	405,546	426,031	428,146	453,279	471,336	493,787	524,048
Nev.	952,902	1,119,957	1,236,244	1,296,177	1,466,435	1,536,214	1,660,597	1,670,569
P.	21,727,050	22,307,058	22,997,415	23,782,399	24,604,082	24,923,232	25,543,267	27,064,501
Wash.	2,386,308	2,344,824	2,455,547	2,609,003	2,735,699	2,815,362	2,993,403	3,163,288
Ore.	1,293,733	1,355,547	1,436,961	1,473,882	1,529,177	1,561,022	1,677,864	1,764,579
Calif.	17,203,832	17,645,910	18,021,843	18,593,427	19,097,670	19,269,385	19,654,790	20,936,126
Alas.	400,452	414,932	417,874	391,835	518,954	535,192	500,864	470,881
H.I	442,725	545,845	665,190	714,252	722,582	742,271	716,346	729,627
U.S.	141,873,914	145,560,664	149,021,659	152,739,380	154,822,425	155,761,623	158,765,984	164,001,259

*Estimated.

SOURCE: NABCA, DISCUS Reports and Liquor Handbook estimates.

Estimated Distilled Spirits Entering Trade Channels
Calendar Years 1977 vs. 1978
(In Wine Gallons)

Class and Type	Net Totals 1977	% of Total	Net Totals 1978	% of Total	% Change
American Whiskey					
Bonded	3,342,710	0.8	3,314,870	0.7	− 0.8
Straights	61,834,249	14.0	64,662,019	13.7	+ 4.6
Straight Blends	1,029,915	0.2	1,270,555	0.3	+ 23.4
100% Lights	236,622	0.1	233,247	−	− 1.4
Blends	51,423,581	11.5	48,857,148	10.4	− 5.0
Total American Whiskey	117,867,077	26.7	118,337,839	25.1	+ 0.4
Imported Whisky					
Scotch (C)	52,195,046	11.8	56,757,046	12.1	+ 8.7
Canadian	48,140,564	10.9	53,640,566	11.4	+ 11.4
Irish	411,992	0.1	672,332	0.1	− 63.2
Total Imported Whisky (A)	100,747,602	22.8	111,069,944	23.5	+ 10.2
Total All Whiskey	218,614,679	49.5	229,407,783	48.6	+ 4.9
Gin					
Domestic	38,730,172	8.8	38,497,099	8.2	− 0.6
Imported	5,302,616	1.2	6,258,488	1.3	+ 18.0
Total Gin	44,032,788	10.0	44,755,587	9.5	+ 1.6
Rum					
Puerto Rican (B)	18,531,829	4.2	22,211,384	4.7	+ 19.9
Virgin Islands (B)	982,988	0.2	1,275,820	0.3	+ 29.8
Other Domestic	2,462,919	0.6	2,776,166	0.6	+ 12.7
Total Domestic Rum	21,977,736	5.0	26,263,370	5.6	+ 19.5
Imported Rum	741,191	0.2	891,164	0.2	+ 20.2
Total Rum	22,718,927	5.2	27,154,534	5.8	+ 19.5
Brandy					
Domestic	13,439,467	3.0	13,459,026	2.9	− 0.1
Imported	3,389,007	0.8	4,461,359	0.9	+ 31.6
Total Brandy	16,828,474	3.8	17,920,385	3.8	+ 6.5
Cordials and Specialties					
Domestic	25,500,349	5.8	30,165,058	6.4	+ 18.3
Imported	5,821,592	1.3	7,059,168	1.5	− 21.3
Total Cordials and Specialties	31,321,941	7.1	37,224,226	7.9	+ 18.8
Vodka					
Domestic	90,638,885	20.5	94,601,157	20.0	+ 4.4
Imported	101,527	−	79,942	−	− 21.3

Total Vodka	90,740,412	20.5	94,681,099	20.0	+ 4.3
Tequila	6,305,002	1.4	6,689,007	1.4	+ 6.1
Prepared Cocktails	9,893,720	2.2	12,094,292	2.6	+ 22.2
Not Elsewhere Specified (D)	1,364,434	0.3	1,938,377	0.4	+ 42.1
Total Domestic Distilled Spirits (A)	318,263,378	72.0	333,629,033	70.7	+ 4.8
Total Imported Distilled Spirits	123,556,999	28.0	138,236,257	29.3	− 11.9
Total All Distilled Spirits	441,820,377	100.0	471,865,290	100.0	+ 6.8

(A) Includes imported products bottled in U.S.
(B) Puerto Rican Rum converted to W.G. at 80 Pr.
Virgin Island Rum converted to W.G. at 80 Pr.
(C) Includes Irish Whiskey from Northern Ireland.
(D) Includes Spirits N.E.S., Bitters and Neutral Spirits, etc.

SOURCE: Calculated from DISCUS Reports

Retail Prices of Leading Brands—Fifth/750 Milliliter Sizes (January, 1979)

State	Blend	Straight	Bond	Scotch	Canadian	Gin	Rum	Brandy	Vodka
Control:	Seagram 7 Crown (Seagram)	Old Crow (National)	Old Forester (Brown-Forman)	Dewar's (Schenley)	Seagram V.O. (Seagram)	Gordon's (Renfield)	Bacardi (Bacardi)	Christian Brothers (Fromm & Sichel)	Smirnoff 80° (Heublein)
Alabama	$5.85	$5.20	$10.50Q	$9.15	$8.20	$5.25	$ 6.55Q	$6.80	$5.60
Idaho	5.85	5.45	–	9.50	8.05	5.35	5.50	6.15	5.65
Iowa	5.30	4.90	–	8.70	7.40	4.70	5.10	6.56	5.10
Maine	5.85	5.35	–	9.25	8.00	5.15	5.50	6.70	5.45
Michigan	5.42	5.05	8.16	8.73	7.55	4.25	5.18	6.12	5.18
Mississippi	N.A.	N.A.	N.A.	N.A.	N.A.	4.55	N.A.	6.49	4.31
Montana	5.90	5.50	–	9.65	8.20	5.30	5.65	N.A.	5.55
New Hampshire	5.70	4.25	–	7.15	6.25	4.00	4.45	5.20	4.35
N. Carolina	5.40	5.00	8.05	8.60	7.55	4.85	5.15	6.20	5.25
Ohio	5.75	5.40	7.10	9.10	7.85	5.25	5.55**	6.45	5.60
Oregon	6.35	5.90	9.50	9.95	8.85	5.65	6.10	6.90	5.85
Pennsylvania	5.99	5.59	9.18	9.50	8.45	5.37	6.88Q	6.86	5.80
Utah	5.85	5.45	–	9.50	8.10	5.25	5.50	6.40	5.55
Vermont	5.10	4.65	–	7.00	6.15	4.50	4.95	5.90	4.80
Virginia	5.10	4.75	7.65	8.20	7.15	4.55	4.85	6.25	4.95
Washington	6.60	5.80	9.35	9.65	8.80	6.05	6.40	6.60	6.25
W. Virginia	5.47	5.05	8.28	8.92	7.64	4.88	5.20	6.25	5.25
Wyoming	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	4.69

Open:									
Alaska	N.A.	N.A.	N.A.	10.25	N.A.	N.A.	N.A.	N.A.	5.47
Arizona	N.A.	N.A	N.A.	8.75	N.A.	4.99	5.65	5.79	5.57
Arkansas	5.61	5.30	8.50	9.60	7.55	5.00	5.90	6.75	5.66
California	N.A.	N.A.	8.29	9.25	N.A.	5.29	5.29	6.29	6.60
Colorado	N.A.	N.A.	N.A.	8.19	N.A.	4.19	4.39	N.A.	5.30
Connecticut	5.75	5.89	7.89	8.39	7.55	4.99	5.59	6.25	5.79
Delaware	5.75	5.23	7.95	8.25	7.41	4.95	5.45	6.20	5.30
Dist. of Columbia	N.A.	N.A.	N.A.	7.79	N.A.	4.47	N.A.	5.99	N.A.
Florida	6.70	5.39**	N.A.	9.65**	8,40	5.19**	6.35**	6.49	6.65
Georgia	6.10**	5.49**	8.99**	8.99	7.95**	4.49**	5.99**	6.49	6.16**
Hawaii	6.49	N.A.	9.25	10.25	8.99	5.49	5.69	6.85	6.19
Illinois	N.A.	4.59	N.A.	7.19	N.A.	4.39	4.69	5.39	4.92
Indiana	N.A.	5.39	8.38**	8.27	N.A.	4.49	5.98	5.99	5.70
Kansas	N.A.	5.43	8.18	9.03	N.A.	5.26	5.81	6.49	5.20
Kentucky	5.55	5.24	7.89	8.75	7.40	4.99	5.38	5.99	5.19
Louisiana	4.79	4.51	6.99**	7.88	6.59	4.39	4.59	N.A.	4.99
Maryland	5.45	4.84	7.69	8.52	7.30	4.69	5.10	5.69	5.05
Massachusetts	6.09	5.79	8.69	9.10	8.10	5.59	5.89	6.59	6.09
Minnesota	N.A.	4.79	N.A.	6.99	N.A.	4.99	5.50	5.69	5.25
Missouri	N.A.	4.69	7.70**	7.69	N.A.	4.15	4.79	6.09	4.99
Nebraska	N.A.	4.49	7.44	7.95	N.A.	4.52	4.99	5.79	5.29
Nevada	N.A.	N.A.	N.A.	9.29	N.A.	4.89	5.50	6.15	5.39
New Jersey	6.19	5.80	8.49	8.99	8.25	5.69	5.99	6.60	5.75
New Mexico	N.A.	N.A.	N.A.	9.75	N.A.	4.29	4.29	5.79	5.15
New York	6.10	4.95	7.99**	8.99	8.20	5.49	5.14	5.89	6.07
N. Dakota	N.A.	4.29	8.79	8.43	N.A.	4.69	5.29	6.19	5.69
Oklahoma	N.A.	4.19	5.95	6.97	N.A.	4.30	4.39	5.25	4.32
Rhode Island	5.65	5.40	8.25	8.79	7.59	5.15	5.45	6.13	5.60
S. Carolina	5.84	5.70	8.32	8.95	7.64	5.25	5.95	6.20	5.91
S. Dakota	5.95	5.60	8.25	9.19	7.99	4.79	5.78	5.89	5.82
Tennessee	5.95	5.19	8.75**	9.39	7.81**	5.79	6.19	6.79	6.35
Texas	N.A.	N.A.	N.A.	7.29	N.A.	4.69	5.79**	6.29	5.65**
Wisconsin	N.A.	4.59	7.26**	7.89	N.A.	4.49	5.25	5.69	5.10

SOURCE: Company data, prices quoted are those reported by brand-owners from informal survey data as being prevalent in the respective markets.

*Sectional Price.

N.A. – Not Available.

Q–Quart size.

AVERAGES:			8.24	8.72		4.92	5.46	6.21	5.47

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BARRON'S

No Three Martinis

Domestic Consumption of Liquor
Scores a Very Small Gain

By JOHN C. MAXWELL JR.

[Initial Two Paragraphs Omitted in Printing]

The industry's flat sales for 1977 underscore the trend toward moderation in American drinking. And the 8%-10% of the population that, by federal estimates, smokes marijuana, is helping keep the cork on a lot of bottles. Even so, 36 brands sold over a million three-gallon cases last year, one brand more than in 1976.

One label, National Distillers' Old Crow, dropped out of the million-case lineup, while two others, Schenley Vodka and Lord Calvert Canadian, joined the ranks. Seagram's 7 Crown continued as the nation's best seller, though sales of that blend were flat compared with the year before.

But the big story of '77 was the big boost enjoyed by Bacardi; volume jumped by almost a million cases, by our count the largest gain in industry history. The brand passed Seagram's V.O., to become the third-ranking label in the U.S., and will soon be giving Heublein's Smirnoff vodka a run for second place. As Table II illustrates, rum is the fastest growing drink, and Bacardi holds an 8-to-1 lead in that category over second-ranking Seagram's Ron Rico.

There were other changes in rank among the leaders. National Distillers' Windsor Supreme jumped to tenth place from fifteenth in 1976. Dewar's Scotch, from Schenley, moved to eleventh and Seagram's Gin to twelfth, each climbing one notch. National's Gilbey's gin fell to thirteenth from tenth and Calvert's Kessler dropped from eleventh to fourteenth.

To lend a measure of validity to the hand-wringing over martini lunches, vodka continued to be the No. 1 seller, with consumption up by an estimated 3.2%. Heublein's Popov brand advanced by more than 20%, coming close to tying Gordon's for the second spot. Popov's longer established stablemate, Smirnoff, boosted sales by 4.6%. Those two brands, plus a third Heublein label, Relska, give the company continued dominance in the growing vodka market.

There remains a conservative school of drinking, however, that believes the only real martini is made from gin. That category registered a modest 2.2% gain last year. But Seagram's did post a 20% gain, one of the biggest jumps among the majors in the industry. Korbrand's Beefeater moved into fourth position, bypassing Fleischmann's.

American Brands' Jim Beam retained the lead in the bourbon market, outselling Brown-Forman's Early Times by almost 2-to-1. Overall, bourbon sales continued to shrink. Jack Daniel's black label was one of the few brands bucking the trend; Brown-Forman had to allocate the whiskey.

Flat Scotch, Declining Blends

Scotch volume was relatively flat. Liggett Group's J&B held its lead. Buckingham's Cutty Sark ran a close second, backed by a $1 million-a-month ad campaign launched early last year. Seagram continued to dominate the blends with the three top products, but no label posted a gain and the category declined by an estimated 4.7%.

Seagram's V.O, again led the Canadian whiskies, though Walker's Canadian Club ran a close second. Sales of both products were up moderately, though volume for the category was relatively flat.

Tequila sales continue at about two million cases a year. Heublein's Jose Cuervo was again the largest selling brand, up 6% from '76 to 545,000 cases.

Irish Growth

Although sake is still a relatively small item in the catalog of spirits, volume has expanded rapidly, reaching somewhat more than 210,000 cases in 1977, vs. 165,000 in '76. Heublein's Kiku and Taru together came close to selling 21,500 cases last year, up from 16,000. Continued gains in this Japanese wine could be propelled by expanding interest in Oriental dishes and the general growth in wine drinking.

Natives of the Emerald Isle like to describe Scotch as "watered Irish," an unsurprising bit of booze chauvinism. What's more surprising is the rapid growth of Irish whiskey sales in the U.S. Volume is still not high enough for inclusion in Table II, but consumption has doubled since 1971, and last year reached close to 200,000 cases.

Seagram's Jameson and Brown-Forman's Bushmill have been battling for leadership, each with sales last year of around 60,000 cases. Heublein sold 35,000 cases of Tullmore Dew; Austin Nichols recorded sales of 25,000 cases of Murphy's and 8,000 cases of Paddy. American Distilling's Dumphy's, with a volume of 9,000 cases, moved up to fifth position from seventh the year before. Overall, Irish whiskey sales shot up 16% in 1977, and the industry expects further gains in '78.

TABLE I: Million-Case Sellers

Brand	1976	1977r	% Chg.
		(000's Omitted)	
7 Crown	6,700	6,700	
Smirnoff	5,615	5,575	+ 4.6
Barcardi	3,783	4,697	+24.2
V.O.	4,100	4,200	+ 2.4

Canadian Club	3,740	3,815	+ 2.0
Jim Beam	3,185	3,265	+ 2.5
Gordon's Gin	2,660	2,710	+ 1.9
J&B Rare	2,650	2,650	
Cutty Sark	2,500	2,550	+ 2.0
Windsor Supreme	2,250	2,375	+ 5.6
Dewar's	2,150	2,300	− 1.7
Seagram's Gin	1,800	2,250	+19.7
Gilbey's Gin	2,100	2,200	+ 4.8
Kessler	2,000	1,965	− 1.7
Canadian Mist	1,685	1,862	+10.5
Calvert Extra	1,800	1,745	− 3.1
Gordon's Vodka	1,690	1,730	+ 2.4
Popov	1,420	1,710	+20.4
Ancient Age	1,650	1,700	+ 3.0
Johnnie Walker Red	1,675	1,690	+ 0.8
Early Times	1,626	1,656	+ 1.8
Fleischmann Pfd.	1,600	1,520	− 5.0
Ten High	1,545	1,465	− 5.2
Christian Brothers	1,425	1,450	+ 1.7
Wolfschmidt	1,400	1,400	+ 1.7
Gilbey's Vodka	1,300	1,395	+ 4.2
Black Velvet	1,300	1,350	+ 3.8
Jack Daniels	1,339	1,344	+ 0.7
Beefeater	1,275	1,340	+ 5.1
Fleischmann Gin	1,395	1,325	− 5.0
Imperial	1,400	1,285	− 8.2
Crown Russe	1,200	1,170	− 2.5
Southern Comfort	1,005	1,117	+11.1
Schenley Vodka	1,000	1,100	+10.0
Lord Calvert Canadian	900	1,050	+16.7
Old Grand Dad	1,050	1,000	− 4.8

TABLE II 3-Gallon Case Sales by Liquor Type

1000's Omitted	1976	1977	Company
VODKA			
Smirnoff	5,615	5,875	Heublein
Gordon's	r1,690	1,730	Gordon, Renfield
Popov	1,420	1,710	Heublein
Wolfschmidt	1,400	1,400	Seagram
Gilbey's	1,300	1,375	National
Crown Russe	1,200	1,170	Calvert (S)
Schenley's	r1,000	1,100	Schenley (GA)
Relska	890	908	Heublein
Kamchatka	r900	900	National
Tolvarisch/Tvarsoki	765	770	American
Mr. Boston	700	700	Mr. Boston (G)
Nikolai	615	640	General Wine (S)
Jacquin	r620	590	Jacquin
Hiram Walker	550	580	Walker (HW)
Fleischmann Royal	520	530	Fleischmann (SB)
Skol	300	500	Publicker
White Tavern	405	415	Fleischmann (SB)
Glenmore	350	350	Glenmore (G)
Canada Dry	r400	325	Somerset (NS)
Dark Eyes	270	275	Jim Beam (AB)
J.W. Dant	N.A.	150	Schenley (GA)
BOURBON			
Jim Beam	3,185	3,265	Jim Beam (AB)
Early Times	r1,626	1,656	Brown-Forman
Ancient Age	r1,650	1,545	Schenley (GA)
Ten High	1,545	1,465	Walker (HW)
Jack Daniels (Black)	r1,335	1,344	Brown-Forman
Old Grand Dad	1,050	1,000	National
Old Crow	1,000	950	National
Old Charter	r900	r900	Schenley (GA)
J.W. Dant	800	800	Schenley (GA)
Old Forester	r655	656	Brown-Forman
Old Taylor	690	655	National
Bourbon Supreme	620	585	American
Sunny Brook	600	525	National
Heaven Hill	510	510	Heaven Hill
Bourbon Deluxe	r450	495	National
Mattingly & Moore	500	470	Calvert (S)

Walker Deluxe	455	455	Walker (HW)
I.W. Harper	r415	400	Schenley (GA)
Wild Turkey	320	385	Austin Nichols (LG)
Davis County	360	360	Fleischmann (SB)
Olde Bourbon	r365	350	Schenley (GA)
Old Kentucky Tavern	335	305	Glenmore (G)
George Dickel	r220	300	Schenley (GA)
Cabin Still	290	290	Somerset (NS)
Kentucky Gentleman	r279	258	Barton
Beam's Choice (8-yr.-old premium)	280	285	Jim Beam (AB)
Old Fitzgerald	r240	240	Somerset (NS)
Stillbrook	240	230	American
Yellowstone	225	215	Glenmore (G)
Old Hickory	250	190	Publicker
Antique Bourbon	275	185	Calvert (S)
Very Old Barton	r176	179	Barton
Weller	125	175	Somerset (NS)
Echo Spring	r160	150	Schenley (GA)
Bellows Club	150	130	National
Benchmark	125	130	Seagram (S)
Mr. Boston	140	125	Glenmore (G)
Canada Dry Bourbon	150	120	Somerset (NS)
G&W Private Stock	100	90	G&W Sales (HW)
SCOTCH			
J&B Rare	r2,650	2,650	Paddington (LG)
Cutty Sark	r2,500	2,500	Buckingham
Dewar's	r2,150	2,300	Schenley (GA)
Johnnie Walker Red	1,675	1690	Somerset (NS)
Ballantine	640	600	Foremost-McKesson
Inver House	600	600	Publicker
Passport	560	580	Calvert (S)
B&L	440	450	Park Benziger
Clan McGregor	395	395	Wm. Grant & Sons Inc.
Teacher's	425	390	Schieffelin
Usher's	r352	361	Brown-Forman
Lauder's	310	335	G&W Sales (HW)
Harvey's	300	330	Park Benziger
Vat 69	r290	330	National
King George IV	r325	300	National
Crawford's	290	295	Somerset (NS)
John Begg	r265	275	Somerset (NS)

House of Stuart	r210	198	Barton
J.W. Dant	170	195	Schenley (GA)
Grant's	185	180	Wm. Grant & Sons Inc.
White Horse	150	165	Calvert (S)
Black & White	150	140	Heublein
100 Pipers	140	140	Seagram (S)
Ambassador	r147	135	Brown-Forman
Martin VVO	r130	130	Foremost-McKesson
Dawson	125	116	Schenley (GA)
PREMIUM SCOTCH			
Chivas Regal	950	915	General Wine (S)
Johnnie Walker Black (R)	r470	510	Somerset (NS)
BLENDS			
7 Crown	6,700	6,700	Seagram (S)
Kessler	2,000	1,965	Calvert (S)
Calvert Extra	1,800	1,745	Calvert (S)
Fleischmann Pfd.	1,600	1,520	Fleischmann (SB)
Imperial	1,400	1,285	Walker (HW)
Corby's Reserve	650	580	Foremost-McKesson
Schenley Reserve	r435	410	Schenley (GA)
Carstairs	450	385	Calvert (S)
Four Roses	425	380	Calvert (S)
Old Thompson	350	350	Glenmore (G)
P.M.	350	320	National
Philadelphia Blended	N/AV	250	Publicker
Guckenheimer	230	220	American
Governors Club	255	190	Publicker
Paul Jones	180	165	Calvert (S)
Barton Reserve	r148	137	Barton
William Penn	145	120	G&W Sales (HW)
Rocking Chair	126	115	Mr. Boston (G)
Wilson	125	110	Calvert (S)
CANADIANS			
V.O.	4,100	4,200	Seagram (S)
Canadian Club	3,740	3,815	Walker (HW)
Windsor Supreme	r2,250	2,375	National
Canadian Mist	r1,685	1,862	Brown-Forman
Black Velvet	1,300	1,350	Heublein
Canadian Lord Calvert	900	1,050	Calvert (S)
MacNaughton's	r745	780	Schenley (GA)
Canadian Ltd	455	465	Fleischmann (SB)
Crown Royal	365	450	Seagram (S)

Harwood	400	400	General Wine (S)
Grande Canadian	r275	285	Schenley (GA)
Canadian Rich and Rare	240	265	Foremost-McKesson
Royal Canadian	235	230	Barclay (HW)
GIN			
Gordon's	2,660	2,710	Gordon/Renfield
Seagram	1,880	2,250	Seagram (S)
Gilbey's	2,100	2,200	National
Beefeater	1,275	1,340	Kobrand
Fleischmann	1,395	1,325	Fleischmann (SB)
Tanqueray	r630	700	Somerset (NS)
Calvert	555	565	Calvert (S)
Walker	455	455	Walker (HW)
Booth's High & Dry	385	405	DCL/Taylor
Schenley 90	r345	400	Schenley (GA)
Mr. Boston	330	330	Glenmore (G)
Burnett's	285	310	Calvert (S)
Glenmore	170	150	Glenmore (G)
Canada Dry	r198	125	Somerset (NS)
Bombay	r57	60	Liggett Group
RUM			
Bacardi	3,783	4,697	Bacardi
Ron Rico	540	575	General Wine (S)
Castillo	198	323	Bacardi
Don Q	200	215	Heublein
Palo Viejo	N/AV	135	Calvert (S)
TEQUILA			
Jose Cuervo	515	545	Heublein
Ole	r105	150	Schenley
Montezuma	r145	137	Barton Brands
El Tort	125	125	American
COCKTAILS			
Heublein Club Cocktails (cans)	860	1,030	Heublein
Heublein (full strength)	535	600	Heublein
Cocktails for Two	(e)	e560	Schenley (GA)
CORDIALS AND FLAVORED BRANDIES			
Southern Comfort	1,005	1,117	Southern Comfort
Walker	1,025	1,075	Walker (HW)
Old Mr. Boston	846	925	Mr. Boston (G)
Arrow	r820	840	Heublein
Leroux	725	765	General Wine (S)

de Kuyper	675	715	National
Jacquin	495	465	Chas. Jacquin
du Bouchett	315	310	Schenley (GA)
Chateaux	230	245	Jim Beam (AB)
Mohawk	220	220	Foremost-McKesson
Bols	r168	177	Brown-Forman
BRANDY (*Domestic*)			
Christian Brothers	1,425	1,450	Fromm & Sichel
Coronet	r430	450	Schenley (GA)
Aristocrat	350	390	California Wine Assn
Paul Masson	300	300	Brown Vintners
Mr. Boston Five Star	260	245	Mr. Boston (G)
IMPORTED SPECIALTIES			
Kahlua	r700	900	Walker (HW) Foreign
Amaretto di Saronno	270	340	Vintages (G)
Drambuie	215	218	W.A. Taylor (HW)
Galliano	210	190	Foremost-McKesson
Grand Marnier	r115	165	Carillon Importers (LG)
Benedictine and B&B	158	158	Fleischmann (SB)
Tia Maria	80	85	W.A. Taylor (HW)
Campari	65	75	Austin Nichols (LG)
Chartreuse	63	63	Scheffelin
Metaxa	53	55	Austin Nichols (LG)
Peter Heering	40	35	W.A. Taylor (HW)
VERMOUTH			
Tribuno	376	375	Tribuno Wines Inc. (C)
Stock	r305	335	Schenley (GA)
Cinzano	255	253	Schieffelin
COGNAC AND BRANDIES *(Imported)*			
Hennessey	225	250	Schieffelin
Courvoisier	210	215	W.A. Taylor (HW)
Martell	r28	70	Brown-Forman

N/A-Not Available; E-Morgan Stanley estimates.
e-Introduced. r-Revised.

5. Complaint in Intervention (of Bohemian Distributing Company), Filed December 6, 1979, in California Court of Appeal.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS,

Petitioners,

vs. **No. 3 Civ. 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor.

1. Bohemian is a California corporation, duly organized and existing under the laws of the State of California with its principal place of business in the County of Los Angeles, State of California. Bohemian is a wholesale distributor of distilled spirits in California and is an "authorized importer" of distilled spirits under A.B. 499.

2. Bohemian seeks to intervene in this action and desires to unite with the respondent, BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ("respondent"), in resisting the claims of petitioners.

3. On October 24, 1979, petitioners commenced this action seeking a writ of mandate and/or, in the alternative, prohibition and/or certiorari (hereinafter "writ of mandate"), and a decision declaring A.B. 499, the amendment to section 23672 of the California Business and Professions Code, effective January 1, 1980, unconstitutional.

4. Bohemian has a direct interest in the subject matter of this action, in that it stands to lose enormous revenues by direct legal operation of any adverse decision rendered herein. If a decision is rendered holding that the challenged section is unconstitutional, such a decision, as a practical matter, would directly jeopardize Bohemian's financial interests. Furthermore, Bohemian has a substantial financial stake in the marketing system which is preserved by A.B. 499. Disposition of this action in the absence of Bohemian as a party would impair the ability of Bohemian to protect its interests.

5. Bohemian has a common interest with respondent in the success of this action. Bohemian is informed and believes, and upon such information and belief alleges, that respondent may not vigorously pursue his own success in this action and may not, in the event this Court renders a decision adverse to respondent, seek a hearing before the California Supreme Court.

6. Bohemian, through its attorneys, has informed the attorneys for respondent that it will apply for leave of court to intervene in this action, and Bohemian has not heard any objection from respondent regarding its proposed application for leave to intervene.

7. Bohemian, through its attorneys, has informed the attorneys for the other known proposed intervenor that it will apply for leave of court to intervene in this action, and Bohemian has not heard any objection from the attorneys

for the proposed intervenor regarding Bohemian's application for leave to intervene in this action.

WHEREFORE, Bohemian prays judgment against petitioners as follows:

1. That Bohemian be permitted to intervene in this action in order to oppose petitioners' request for a writ of mandate;

2. For costs of this proceeding;

3. For such other and further relief as this court may deem just and proper.

DATED: November 29, 1979

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
Rochel S. Blachman
and
George Miron, Of Counsel

By /s/ Frank Rothman
Frank Rothman

Attorneys for Proposed Intervenor
BOHEMIAN DISTRIBUTING COMPANY

(Proof of Service and verification omitted in printing)

6. Complaint in Intervention (of Wine & Spirits Wholesalers of California), Filed November 29, 1979 by Order of December 6, 1979, in California Court of Appeal.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTION COMPANY, INC., a California corporation d/b/a/ GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREEN CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a/ SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a/ TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a/ HOUSE OF FINE SPIRITS,

Petitioners,

vs. — **No. 3 Civil 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenor.

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600 New Hampshire Avenue N.W., Suite 580
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Telephone: (202) 466-2222
Attorneys for Proposed Intervenor
Bohemian Distributing Company

COMPLAINT IN INTERVENTION

Intervenor, WINE & SPIRITS WHOLESALERS OF CALIFORNIA, appearing by leave of court, alleges:

1. Intervenor, WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation, is a trade association duly organized and existing under the laws of this State and is authorized to represent its members in this proceeding. Intervenor's membership consists of a substantial number of the distilled spirits wholesalers and importers throughout the State of California, and its members sell approximately 80% of the distilled spirits sold by wholesalers to retailers in California. Intervenor's members are all similarly situated with respect to the issues presented by this litigation. Intervenor's members are individually too numerous to come before this Court but constitute a class of persons each of whom has the same substantial and direct interests in the decision to be rendered herein. Intervenor therefore seeks intervention as the representative of the class of its membership.

2. On or about October 24, 1979, Petitioners commenced this proceeding against Respondent, BAXTER RICE, as Director of the Department of Alcoholic Beverage Control of the State of California, seeking a writ of mandate and/or prohibition and/or certiorari to restrain Respondent from enforcing § 23672 of the Business and Professions Code from and after its amendment by Assembly Bill 499, effective January 1, 1980. Petitioners assert that Business and Professions Code § 23672, as amended by AB 499, is

invalid on its face under the California Constitution as an unconstitutional delegation to private parties of the power to regulate the importation of liquor and as a denial of due process and equal protection of the laws.

3. Assembly Bill 499 constitutes a technical amendment to § 23672 and reaffirms the requirement that importers of distilled spirits be authorized by the distilled spirits brand owner or his authorized agent in order to lawfully purchase and accept delivery of distilled spirits imported into California.

4. Intervenor intervenes in this action on the grounds that it has a direct interest in the matters in litigation and a substantial interest in the success of Respondent and, as a practical matter, disposition of this matter in the absence of Intervenor will impair and impede its members' ability to protect their interests. The matter in litigation is the validity of the state-imposed system of regulating the importation of alcoholic beverages whereby a licensed importer is prohibited from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of the brand by the brand owner or his authorized agent.

5. Section 23572 [sic], as amended, affords Intervenor's members a substantial measure of legitimate protection against unfair, predatory and unlawful business practices, and disposition of this litigation unfavorable to Intervenor's members would deprive them of this valuable protection. The direct and proximate effects that an invalidation of § 23672, as amended, would have on Intervenor's members include the following:

(a) Substantial investments in longstanding wholesale distilled spirits businesses would be immediately, permanently and adversely affected.

(b) A substantial, immediate and permanent

reduction in the value of the existing "authorized" distilled spirits wholesale distributorships would occur.

(c) The goodwill built up over the years by promotional activities and advertising at great cost and expense by the "authorized" distilled spirits wholesalers would be seriously damaged if not totally destroyed.

6. Section 23672, as amended, is part of a comprehensive regulatory scheme designed to facilitate the State's supervision and control over the importation of alcoholic beverages into this State and the disposition and taxation of imported alcoholic beverages within this State. Specifically, § 23672, as amended, will significantly enhance the State's ability to:

(a) Effectively monitor the importation and dispostion of distilled spirits.

(b) Assure payment of excise and sales taxes on distilled spirits.

(c) Maintain the three-tier distribution system in California by assuring independence between distiller, wholesaler-importer, and retailer.

(d) Preserve the competitive viability of small retailers.

(e) Promote the orderly disposition of distilled spirits in conformity with law, including the Unfair Practices Act (Business and Professions Code § 17000, et seq.).

(f) Protect the legitimate interests of brand name distillers in the goodwill and integrity of their brand names and trademarks.

(g) Promote temperance.

7. Intervenor has a substantial interest in the success of the Respondent herein. However, Respondent has not adequately represented the interests of Intervenor's members

and others in upholding the validity of the provisions of the Alcoholic Beverage Control Act in the past, and Intervenor is informed and believes, and on the basis thereof alleges, that Respondent will not adequately represent the interests of Intervenor in the instant matter. Intervenor therefore intervenes in order that the issues raised in this proceeding may be fully litigated and that its members' interests may be adequately protected.

8. Petitioners commenced this proceeding for the purpose of barring the enforcement of § 23672, as amended by AB 499, on the grounds that the statute is invalid as being an unconstitutional delegation of legislative power to private parties and a denial of due process and equal protection of the laws.

9. Section 23672, as amended, does not constitute an unconstitutional delegation of legislative power to regulate the importation of distilled spirits into California nor does it deny petitioners due process or equal protection of the laws. Section 23672, as amended, is a valid exercise of the California Legislature's police powers and the power expressly conferred by the Twenty-First Amendment to the United States Constitution to regulate the importation of alcoholic beverages. The classifications created by the Legislature in § 23672, as amended, are reasonable and bear a rational relationship to the State's legitimate purposes.

10. Intervenor is represented herein by competent and experienced counsel who are familiar with the facts and law involved and will adequately represent the interests affected.

WHEREFORE, Intervenor prays for judgment against Petitioner as follows:

1. That Intervenor be permitted to intervene herein on behalf of its members and to answer Petitioner's Petition for Writ of Mandate and/or Prohibition and/or Certiorari.

2. That this Court hold that the provisions of § 23672, as amended by AB 499, are valid and enforceable and free from any constitutional infirmities and that § 23672, as amended, is a valid exercise of the State's power, derived from the Twenty-First Amendment, to regulate the importation of alcoholic beverages into California.

3. That this Court deny Petitioners' Petition for Writ of Mandate and/or Prohibition and/or Certiorari.

4. For costs of this proceeding.

5. For such other and further relief as the Court may deem just and proper.

DATED: November 29, 1979.

Ball, Hunt, Hart, Brown and Baerwitz
By /s/ Joseph A. Ball
JOSEPH A. BALL
William T. Chidlaw
A Professional Corporation
By /s/ William T. Chidlaw
WILLIAM T. CHIDLAW
Attorneys for Intervenor

(Proof of service and verification omitted in printing)

EXHIBIT L

7. Of Exhibits to Petitioners' Reply Memorandum of Points and Authorities in Support of Petition and Request for Stay of Enforcement, Filed December 21, 1979, in California Court of Appeal.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation, et al.,

Petitioners,

vs **No. 3-CIV-19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenor.

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EXHIBIT L — LEGISLATIVE HISTORY

Assembly Committee on Governmental Organization
Frank Vicencia, Chairman.

Staff Analysis of Assembly Bill 499 (Vicencia)

As Introduced: February 8, 1979

Subject: Alcoholic Beverages

Consultant: Terry.

SUMMARY

Continues provisions prohibiting an alcoholic beverage wholesaler from importing any brand unless authorized by the brand owner or his authorized agent.

BACKGROUND

The ABC Act presently requires the licensee who files the minimum retail price (fair trade) schedule for a particular brand of distilled spirits to designate those wholesalers authorized to import the brand. The person filing the fair trade price is the brand owner or an authorized agent.

Last May the State Supreme Court declared the fair trade provisions of the ABC Act unconstitutional. Consequently, the restrictions on the unauthorized importation of distilled spirits are invalid.

DESCRIPTION OF THE BILL

This measure deletes the reference to the licensee filing the minimum retail price schedule and instead specifies that it is the brand owner or his authorized agent who must designate the wholesalers authorized to import the brand.

COMMENTS/QUESTIONS

Because of the fair-trade decision it is now technically possible for an unauthorized California wholesaler to acquire and distribute the brands of *any* national distiller.

The unauthorized wholesaler acquires these brands from out-of-state suppliers doing business in "price affirmation" states such as Oklahoma and Michigan. These states require a distiller to certify that its wholesale price within the state is the lowest price being quoted by the distiller in any of the other 49 states.

Unauthorized wholesalers can then import national brands into California and thereby circumvent the exclusive distributorship agreements normally made between distillers and wholesalers.

Presumably, an unauthorized wholesaler can supply retailers with national brands for a lower cost than an authorized wholesaler. However, since there have not yet been any price postings by unauthorized wholesalers, the extent of the savings to retailers is not known.

KNOWN POSITIONS

The following SUPPORT AB 499:

Distilled Spirits Council of the United States
California Wine and Spirits Wholesalers
California Teamsters
California Retail Liquor Dealers Association

The following OPPOSE AB 499:

California Retailers Association
California Grocers Association
Norman-Williams, Inc. (Independent Wholesalers)
Farmers Markets
Consumers Union

WAYS AND MEANS STAFF ANALYSIS

Bill Number—AB 499; Author—Vicencia; Amended —; Item—28; Index—Licensing; Policy Committee—Gov. Organization; Consultant—K. Archuleta.

SUBJECT: Alcoholic Beverages.

FISCAL SUMMARY:	FUND (G,S,N,B, F, or L)	1978/79 FY	1979/80 FY	1980/81 FY
State Cost: None	G	____	____	____
Local Cost: Possible cost to local government for enforcement of law. Bill contains a cost/savings disclaimer.	L	____	____	____

Disclaimed: ☒; Reimbursed: ☐

Urgency: Yes ☐ No ☒

SUMMARY:

AB 499 amends current law to prohibit an alcoholic beverage wholesaler from importing any brand unless authorized by the brand owner or an authorized agent.

COMMENTS:

This bill should contain a Crimes and Infractions disclaimer as to local costs.

FISCAL IMPACT:

AB 499 contains no State costs. There are potential costs to local government for enforcing this law. The bill disclaims the cost and makes no appropriation or reimbursement.

ANALYSIS:

Current law requires the licensee who files the minimum retail price schedule for a particular brand of distilled spirits to designate those wholesalers authorized to import the brand. The person filing the minimum retail price schedule is the brand owner or an authorized agent.

The State Supreme Court last year declared the minimum retail price (fair trade) provisions of the Alcoholic Beverage Control Act unconstitutional. Consequently, the restrictions on the unauthorized importation of alcoholic beverages are invalid.

AB 499 would delete the reference to the licensee filing the minimum retail price schedule and, instead, specify that it is the brand owner or his authorized agent who must designate the wholesalers authorized to import the brand.

ASSEMBLY THIRD READING

AB 499 (Vicencia) As Amended: May 10, 1979.

ASSEMBLY ACTIONS:

Committee--G. O.	Committee—W. & M.
Vote—6-0	Vote—17-2
Ayes:	Ayes: Berman, Chacon, Egeland, Goggin, Hayden, Imbrecht, Knox, Levine, Mori, Roos, Ryan, Statham, Stirling, Vasconcellos, N. Waters, Young, Boatwright
Nays:	Nays: Hart, Duffy

DIGEST

Under the Alcoholic Beverages Control (ABC) Act a licensee (alcohol brand owner or authorized agent) who files the minimum retail (fair trade) price schedule is required to designate the wholesalers authorized to import the brand.

The State Supreme Court, however, has declared the fair trade provisions of the ABC Act unconstitutional.

This bill deletes the reference to the filing of the minimum retail price schedule and instead specifies that the brand owner or the authorized agent must designate wholesalers authorized to import the brand.

FISCAL EFFECT

No state costs.

There are potential enforcement costs to local government. The bill contains a "crimes and infractions" dis-

claimer and provides no appropriation. The bill does, however, recognize that a local agency or school district may make claims for reimbursement.

COMMENTS

Because of the court decision, it is possible for a wholesaler, whether authorized or not, to acquire and distribute the brands of any national distributor. The unauthorized wholesaler acquires these brands from out-of-state suppliers doing business in "price affirmation" states. These states require a distiller to certify that its wholesale price within the state is the lowest price being quoted by the distiller in any of the other 49 states. Unauthorized wholesalers can then import national brands into California and thereby circumvent the exclusive distributorship agreements normally made between distillers and wholesalers. Presumably an unauthorized wholesaler can provide national brands at a lower price.

5/17/79 ASSEMBLY OFFICE OF RESEARCH AB 499

Senate Committee on Governmental Organization
Hearing Date: 6/12/79

STAFF ANALYSIS OF ASSEMBLY BILL NO. 499
(Vicencia)
(As Amended 5/10/79)

SUBJECT

Alcoholic Beverages: Licensed Importers

DESCRIPTION

1. AB 499 specifies that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer by the brand owner or his agent.
2. The measure requires that distilled spirits imported into California shall come to rest at the warehouse of the licensed importer before sale and delivery to a retail licensee.
3. The measure contains an SB 90 disclaimer.

BACKGROUND

Related Legislation:

SB 570 (B. Greene), 1979 Session.
Would prohibit any brand owner or manufacturer of distilled spirits from selling product in California at a higher price than it would be sold for anywhere else in the United States. (Approved by this Committee 5/1/79; Approved by Senate 5/25/79; Pending in Assembly policy committee).

For many years California law required the brand owner who filed the minimum retail price schedule for a particular brand of distilled spirits to designate those wholesalers or importers who would be authorized to sell the product in this state.

However, the California Supreme Court decision in 1978 that struck down the so-called "fair trade" law on alcoholic beverages, also invalidated the provision relating to the designation of authorized importers.

As a consequence, it is now possible for any California wholesaler to import and distribute the brands of any distiller or brand owner. This has circumvented the long-standing distributorship agreements between manufacturers and wholesalers.

Supporters stress that AB 499 simply provides that the brand owner can designate any and all wholesalers he desires to handle his product. There is no restriction as to how many wholesalers can be listed. In addition, the measure in no way infringes upon the California Supreme Court decision striking down "fair trade" laws in retail liquor pricing.

Opponents argue that AB 499 will reinstate "fair trade" at the wholesale level, thereby raising retail prices. In addition, the measure will restrict competition unfairly among wholesalers, and prohibit the free importation of liquor from other states.

OWN POSITIONS:

The following organizations *SUPPORT* AB 499:

Wine and Spirits Wholesalers of California
California Retail Liquor Dealers Association
California Teamsters Public Affairs Council

The following organizations *OPPOSE* AB 499:

California Grocers Association
California Retailers Association
Consumers Union
Farmers Markets

WRITTEN COMMUNICATIONS RECEIVED:

California Grocers Association

FISCAL COMMITTEE: Senate Finance Committee

Legislative Analyst
June 19, 1980

ANALYSIS OF ASSEMBLY BILL NO. 499 (Vicencia)
As Amended in Assembly May 10, 1979
1979-80 Session

Fiscal Effect:

Cost: 1. No state cost.
2. *Mandated local cost*, undetermined, if any. No state funding.

Revenue: Undetermined impact on state and local sales tax revenues.

Analysis:

This bill prohibits a licensed alcoholic beverage importer (generally a wholesaler) from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of the brand by the brand owner or his agent.

Prior to a May 1978, California Supreme Court decision which held that the distilled spirits minimum retail price maintenance law was invalid, a licensed importer could purchase or accept delivery only if he was authorized to do so by the person who filed the minimum retail price schedule. Because the court decision invalidated the schedule requirement, it also invalidated the designation requirement addressed by this bill.

The Department of Alcoholic Beverage Control advises that this bill has no direct state cost. To the extent that this bill increases the prices of distilled spirits it would result in increased state and local sales tax revenues. However, this increase may be offset by changes in consumption patterns which also affects sales tax revenues.

Mandated Local Program. This bill establishes a new misdemeanor which could be enforced by local government at an undetermined, if any, increase in costs. The bill disclaims state responsibility for such costs.

Dated Typed: 6-22-79

POSITIONS

SUPPORT: Wine & Spirits Wholesales [sic] of California, Calif. Retail Liquor Dealers Assn., Calif. Teamsters Public Affairs Council

OPPOSED: Calif. Grocers Assn., Calif. Retailers Assn., Consumers Union, Farmers Market

Committee Votes: Senate Floor Vote:

Assembly Floor Vote: 49-15, pg. 5087 (5-21-79)

DIGEST

AB 499 specifies that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer by the brand owner or his agent.

The measure requires that distilled spirits imported into California shall come to rest at the warehouse of the licensed importer before sale and delivery to a retail licensee.

FISCAL EFFECT:

Appropriation: No Fiscal Committee: No Local: Yes

STATE MANDATED LOCAL PROGRAM: SB 90 DISCLAIMER

There are potential enforcement costs to local government. The bill contains a "crimes and infractions" disclaimer and provides no appropriation. The bill does, however, recognize that a local agency or school district may make claims for reimbursement.

COMMENTS:

Related Legislation

SB 570 (B. Greene), 1979 Session.

Would prohibit any brand owner or manufacturer of distilled spirits from selling product in California at a higher price than it would be sold for anywhere else in the United States. (Presently in Assembly)

For many years California law required the brand owner who filed the minimum retail price schedule for a particular brand of distilled spirits to designate those wholesalers or importers who would be authorized to sell the product in this state.

However, the California Supreme Court decision in 1978 that struck down the so-called "fair trade" law on alcoholic beverages, also invalidated the provision relating to the designation of authorized importers.

As a consequence, it is now possible for any California wholesaler to import and distribute the brands of any distiller or brand owner. This has circumvented the long-standing distributorship agreements between manufacturers and wholesalers.

Supporters stress that AB 499 simply provides that the brand owner can designate any and all wholesalers he desires to handle his product. There is no restriction as to how many wholesalers can be listed. In addition, the measure in no way infringes upon the California Supreme Court decision striking down "fair trade" laws in retail liquor pricing.

Opponents argue that AB 499 will reinstate "fair trade" at the wholesale level, thereby raising retail prices. In ad-

dition, the measure will restrict competition unfairly among wholesalers, and prohibit the free importation of liquor from other states.

Assembly Noes: Bergeson, Dennis Brown, Chappie, Duffy, Felando, Hart, Hayden, Hayes, Kelley, Leonard, Mountjoy, Naylor, Statham, Vasconcellos, Wyman

SENATE DEMOCRATIC CAUCUS
SENATOR OMER L. RAINS, *Chairman*

Bill No. AB 499 (As Amended: 5-10-79)

Author: Vicencia (D)

Subject: Alcoholic Beverages.

Finance Committee:

Be placed on Second Reading File pursuant to Senate Rule 28.8.

Policy Committee: Governmental Organization

Ayes (7) Alquist, Beverly, Carpenter, Cusanovich, Foran, Marks, Dills

Noes (0).

Assembly Floor Vote: 49 AYES; 15 NOES.

Summary of Legislation:

Existing law prohibits a licensed importer of distilled spirits from purchasing or accepting delivery of any brand of distilled spirits, unless he is designated as an authorized importer of such brand by the alcoholic beverage licensee who files a minimum retail price schedule for such brand, as specified.

This bill revises such prohibition to require that such licensed importer be designated as an authorized importer of such brand of distilled spirits by the brand owner or his authorized agent prior to such purchase or delivery.

Fiscal Effect:

Contains SB 90 disclaimer language.

Proponents:

Wine and Spirits Wholesalers of California
California Retail Liquor Dealers Association
California Teamsters Public Affairs Council

Opponents:

California Grocers Association
California Retailers Association
Consumers Union
Farmers Markets.

Arguments in Support:

Proponents argue that this bill is the needed protection wholesalers, small retailers, and unions need in order to survive. Small retailers are the bulk of dealers in California, numbering 70%. The unions would suffer severe job losses without this bill. Proponents state that the bulk of consumers in California would benefit from this bill.

Arguments in Opposition:

Opponents argue that this bill reinstates "fair trade" at the wholesale level, thereby raising retail prices. In addition, the measure restricts competition unfairly among wholesalers, and prohibits the free importation of liquor from other states.

ENROLLED BILL MEMORANDUM TO GOVERNOR

Bill No. AB 499; Date July 20, 1979; Author Vicencia.

Vote—Senate _____ Unanimous

Ayes— 21

Noes— 8 Craven, Garamendi, M. Garcia, Mills, Richardson, Vuich, Wilson, Speraw.

Vote—Assembly _____ Unanimous

Ayes— 49

Noes— 15 Bergeson, D. Brown, Chappie, Duffy, Felando, Hart, Hayden, Hayes, Kelley, Leonard, Mountjoy, Naylor, Statham, Vasconcellos, Wyman.

AB 499 — Vicencia Existing statutory law prohibits a licensed importer of distilled spirits from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the alcoholic beverage licensee who files a minimum retail price schedule for such brand, as specified.

This bill would revise such prohibition to require that such licensed importer by [sic] designated as an authorized importer of such brand of distilled spir [sic] by the brand owner of [sic] his authorized agent prior to such purchase or delivery.

SPONSOR

Distilled Spirits Council of the United States.

SUPPORT

California Teamsters Public Affairs Council
Wine & Spirit [sic] Wholesalers of California
Southern California Retail Liquor Dealers Association
California Retailer Liquor Dealers Association
2000 telegrams, mailgrams and letters.

OPPOSITION

Senator Marz Garcia
Senator Craven
California Retailers Association
Consumers Union
California Retail Liquor Dealers Association (San Diego & Imperial Counties)
135 cards and letters.

STATE FISCAL IMPACT

None.

DEPARTMENT OF FINANCE

AUTHOR—Vicencia; Bill Number—AB 499; Date Last Amended—May 10, 1979.

SUBJECT:

This bill would require that any importer of Alcoholic Beverages be licensed by the brand owner or his agent.

SUMMARY OF REASONS FOR VETO

Increased cost of product to the consumer.

FISCAL SUMMARY

1978-79	1979-80	1980-81	Fund
-0-	-0-	-0-	—

ANALYSIS

A. Specific Findings

Current law prohibits a licensed importer of distilled spirits from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the alcoholic beverage licensee who files a minimum retail price schedule for such brand, as specified. A recent California Supreme Court case (*Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431) declared that provisions requiring the filing of such minimum retail prices to be invalid.

This bill would revise such prohibition to require such licensed importer to be designated as an authorized importer of distilled spirits by the brand owner or his authorized agent prior to such purchase or delivery. In effect, this bill would restore a segment of the "Fair Trade" law and preclude retailers from shopping around to get the best price.

B. Fiscal Summary

None.

8. Order of the California Court of Appeal That the Alternative Writ of Mandate and a Stay Issue, Filed December 31, 1979.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

Norman Williams Company v. Baxter Rice.

3 Civil 19089.

Filed December 31, 1979.

By the Court:

Let an alternative writ of mandate issue. Respondent's and intervenors' written returns are to be served and filed on or before January 21, 1980. Petitioners' replication, if any, is to be served and filed within 15 days after the filing of the returns.

It is further ordered that respondent Baxter Rice, Director, Department of Alcoholic Beverage Control, is to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672, as amended by Assembly Bill 499, effective January 1, 1980, pending filing of the returns and further order of this court.

Dated: December 31, 1979.

PUGLIA, P. J.

cc: Leland Selna, Jr.
Max Lieberman
George Weickhardt
Law Office of Feldman, Waldman
and Kline
Russ Bldg., 27th Floor
235 Montgomery St.
San Francisco, CA. 94104

cc: Thomas W. Martin
Attorney at Law
926 J St., #1116
Sacramento, CA. 95814

cc: George Roth
Deputy Attorney General
(Certified)

cc: William T. Chidlaw
Attorney at Law
Point West Executive Center
1455 Response Rd., Suite 191
Sacramento, CA. 95815

cc: Law Office of Ball, Hunt, Hart,
Brown & Baerwitz
Joseph A. Ball
Anthony Murray
Michael Maloney
James Polish
445 S. Figueroa St.
Los Angeles, CA. 90071

cc: Law Office of Wyman, Bautzer,
Rothman & Kuchel (Both Offices)

9. Alternative Writ of Mandate and Stay, Issued by Wilfried J. Kramer, Clerk, California Court of Appeal, Filed December 31, 1979.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, et al.,
Petitioners,

v. **3 Civil 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,
Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California Corporation, and BOHEMIAN DISTRIBUTING COMPANY,
Intervenors.

ALTERNATIVE WRIT OF MANDATE AND STAY

TO BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent, and WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California Corporation and BOHEMIAN DISTRIBUTING COMPANY, Intervenors:

WHEREAS, Norman Williams Company, a California Corporation, et al., petitioners herein, have filed their duly verified petition for writ of mandate, and it appearing to this Court that petitioners herein have no other plain, speedy, or adequate remedy at law and that the relief prayed for herein should be granted;

NOW THEREFORE, you the above named Respondent, are hereby commanded forthwith to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672, as amended by Assembly

Bill 499 effective January 1, 1980, and to indicate to this Court that you have done so or that you show cause in writing on or before January 21, 1980, why you have not done so and why the relief prayed for in this proceeding should not be granted. Pending filing of the return and further order of this Court, you are ordered to desist and refrain from taking any action or proceeding to enforce Business and Professions Code Section 23672 as amended by Assembly Bill 499 effective January 1, 1980. You the above named Respondent and Intervenors are directed to file your written returns by January 21, 1980. Petitioners' replication, if any, is to be filed within 15 days after the filing of the returns.

WITNESS THE HONORABLE ROBERT K. PUGLIA, Presiding Justice of the Court of Appeal of the State of California, in and for the Third Appellate District.

ATTEST my hand and the seal of the Court this 31st day of December, 1979.

WILFRIED J. KRAMER, Clerk,
By /s/ Susan Whiteacre
Deputy

10. Demurrer of Intervenor Bohemian Distributing Company to Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari and Memorandum of Points and Authorities in Support Thereof, Filed January 21, 1980, in California Court of Appeal.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Petitioners,

vs. **No. 3 Civ 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor.

(Filed concurrently with Answer)

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Telephone: (202) 466-2222
Attorneys for Intervenor
Bohemian Distributing Company

[Table of Contents Omitted in Printing]

Intervenor Bohemian Distributing Company hereby demurs to the amended petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari herein on each of the following grounds:

1. The claims in the amended petition, and each of them, fail on their face to state facts sufficient to constitute a cause of action for issuance of a writ of mandate, and/or, in the alternative, prohibition and/or certiorari, in that the claims in said amended petition fail as a matter of law to support the conclusion that California Business & Professions Code, Section 23572 [sic], as amended by Assembly Bill 499, is unconstitutional on its face or that it violates or is preempted by the federal antitrust laws.

WHEREFORE, intervenor Bohemian Distributing Company prays as follows:

1. That this demurrer be sustained without leave to amend;

2. That the alternative writ and stay order be discharged;

3. That the amended petition be dismissed;

4. For costs of proceeding herein incurred; and

5. For such other and further relief as the court may deem proper.

DATED: January 21, 1980.

Respectfully submitted,

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
and
George Miron
By /s/ Frank Rothman
Attorneys for Intervenor
Bohemian Distributing Company

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT

When the legislature recently enacted Assembly Bill No. 499, 1979 Cal. Stats. ch. 280 (hereinafter "A.B. 499"), California rejoined a growing number of states with primary source legislation. A.B. 499 specifically provides that importers may only import into California those distilled spirits as to which they have received authorization from the brand owners.

Petitioners claim that A.B. 499 is unconstitutional on its face in four ways. Petitioners assert that A.B. 499 would delegate legislative power to private persons in violation of their rights under the California Constitution. Petitioners also assert that all wholesalers have both federal and state-of-California constitutional rights to import liquor into California, and that A.B. 499 will deprive them of those rights without due process of law. Petitioners further assert that A.B. 499 would discriminate against them in violation of the federal and state constitutional guaranties of equal protection of law. Finally, petitioners assert that A.B. 499 is inconsistent with, and preempted by, the federal antitrust laws.

In each and every respect, petitioners fail to set forth facts sufficient to state a cause of action. Petitioners' due process claim is deficient, as a matter of law, because there is no constitutional right to import liquor into any state. The Twenty-first Amendment, second section, of the United States Constitution reserves to the states absolute power to prohibit entirely such importation; and, therefore, California, when restricting the use of importers' licenses, does not deprive petitioners, or any of them, of any rights protected by the due process clauses of either the federal or state constitutions. Likewise, there are no protectible rights

inherent in the decision of a single brand owner in determining whether to authorize a particular importer to import into California a particular brand of distilled spirits manufactured by that brand owner; such a decision is personal in nature and cannot be utilized, as a matter of law, to form a cause of action for denial of due process.

The inherently private nature of the decision of the distilled spirits manufacturer also, as a matter of law, defeats petitioners' claim of any unlawful delegation. While the legislature cannot constitutionally avoid its responsibility as to fundamental issues by delegating that responsibility to others, the legislature may constitutionally enact laws which are effectuated by conduct of others so long as that conduct is not legislative in nature. It is beyond dispute that the decision of a particular brand owner in determining whether to authorize a particular importer to import into California a particular brand of distilled spirits manufactured by that brand owner is a purely private act. Since no other action is authorized by A.B. 499, the private actions which trigger the workings of A.B. 499 are merely acts contemplated by the legislature, are purely private in nature and are not in any fashion legislative in character. Therefore, A.B. 499 does not, as a matter of law, delegate the power to make a law and is not unconstitutional as an unlawful delegation.

Petitioners' equal protection claims are also defective. It is without question that in analyzing this claim, A.B. 499 is to be judged under the rational basis standard since A.B. 499 does not draw lines involving a suspect classification nor does it touch on fundamental interests. Under the rational basis test, petitioners are required to show that A.B. 499, as a matter of law, does not bear any rational relationship to a conceivable legitimate state purpose. Not only have petitioners failed to carry their burden, but it has been

affirmatively shown that A.B. 499, does bear a rational relationship to a legitimate state purpose. Under the power of the Twenty-first Amendment, California has enacted a system of laws that regulate the handling and control of alcoholic beverages in every facet of distribution, including extensive record keeping requirements apparently intended to maintain supervision over this highly regulated industry.

This pervasive scheme of economic regulation was supplemented by the adoption of A.B. 499. As a result, California's alcoholic beverage regulators will now possess a direct source of information to determine each brand which each wholesaler is importing, providing a quick and easily accessable [sic] cross-check of sales records in any inquiry into corrupt business practices or tax evasion. Additionally, A.B. 499 allows brand owners to implement effectively vertical restraints to control the efficient distribution of their own products, a power residing in manufacturer of almost all products. More efficient distribution unquestionably can lead to greater interbrand competition and provides greater stability in the chain of distribution. Thus, undeniably, A.B. 499 and the distinctions made therein rationally relate to the legitimate state purpose of control and supervision of an orderly distribution network for alcoholic beverages, and therefore, are not subject to attack under the equal protection guarantees of the federal or state constitutions.

Petitioner's antitrust allegations are also fatally deficient. Nothing contained in A.B. 499 authorizes conspiratorial conduct of any kind nor does it require activity which is in and of itself illegal. The vertical restraints that a brand owner may impose upon the distribution chain of its own product by virtue of A.B. 499 is not conduct which is per se illegal under the antitrust laws; and therefore, a facial attack of A.B. 499 is precluded. Neither does A.B. 499 enter into a field preempted by any federal antitrust law. The distorted

constructions given by petitioners to the Clayton Act, the Federal Trade Commission Act, and the Federal Alcohol Administration Act are completely unsupportable because the interpretations urged by petitioners are not consistent with the plain meaning of these acts, are inconsistent with intent of Congress and ignore the single-trader rule which arises from the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. Accordingly, petitioners have not shown, nor can they show, that A.B. 499 on its face violates or is preempted by the federal antitrust laws.

As a matter of law, petitioners have utterly failed in all respects to show that A.B. 499 is unconstitutional on its face. Petitioners have attempted to distort private acts, into acts of a governmental nature. The nature of the acts involved on the part of the brand owner, *i.e.*, the individual decision of a brand owner in determining whether to authorize a particular importer to import a particular brand of distilled spirits manufactured by that brand owner, is not legislative in nature and cannot support a claim of unlawful delegation; nor is it a propriety [sic] right protected by due process. Furthermore, this activity cannot support a finding of per se illegality with regard to the antitrust laws and cannot support a facial attack on A.B. 499. A.B. 499 was enacted specifically to maintain order in the chain of distribution of liquor and with an eye toward enhanced supervision of this industry. In view of the Twenty-first Amendment, the power of the state to so act cannot be doubted.

II. ARGUMENT

In order to avoid repetition, intervenor Bohemian Distributing Company refers to, and incorporates herein by reference, intervenor Bohemian Distributing Company's

memorandum in opposition to petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari, filed herein on or about November 29, 1979, intervenor Bohemian Distributing Company's memorandum in opposition to amended petition for writ of mandate and/or in the alternative, prohibition and/or certiorari, filed herein on or about December 24, 1979, and intervenor Bohemian Distributing Company's memorandum filed concurrently with return of alternative writ of mandate in opposition to amended petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari, filed concurrently herewith.

III. CONCLUSION

For all of the foregoing reasons, intervenor Bohemian Distributing Company respectfully urges that its demurrer be sustained.

Respectfully submitted,

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
and
George Miron — Of Counsel
By /s/ Frank Rothman
Attorneys for Intervenor
Bohemian Distributing Company

(Declaration of Service by Mail Omitted in Printing)

11. Answer of Intervenor Bohemian Distributing Company to Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari, Filed January 21, 1980, in California Court of Appeal. (Filed Concurrently With Demurrer).

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation d/b/a GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE d/b/a SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE d/b/a TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR. and SHIRLEY D. KIRBY d/b/a HOUSE OF FINE SPIRITS,

Petitioners,

vs. **No. 3 Civ. 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenor.

(Filed concurrently with Demurrer)

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Attorneys for Intervenor
Bohemian Distributing Company

Intervenor BOHEMIAN DISTRIBUTING COMPANY ("Bohemian") (concurrently with its demurrer thereto) hereby answers the amended petition for writ of mandate and/or, in the alternative, prohibition and/or certiorari as follows:

INTRODUCTORY ANSWER

1. With respect to the first paragraph at page 2 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations, and specifically denies that A.B. 499 is unconstitutional.

2. Answering the second paragraph at page 2 of the amended petition, Bohemian admits that A.B. 499 amends Business and Professions Code §23672 and that A.B. 499 speaks for itself. Bohemian further admits that A.B. 499 was to become effective on January 1, 1980. Except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

3. Answering the first and second sentences of the first paragraph at page 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the third, fourth and fifth sentences of the first paragraph at page 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allega-

tions contained therein, and on that ground, denies generally and specifically each and all said allegation.

4. Answering the first, second and third sentences of the second paragraph at page 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the fourth sentence of the second paragraph at page 3 of the amended petition, Bohemian admits that some distillers have already refused to grant some wholesalers, including some petitioners, permission to import their brands; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth and sixth sentences of the second paragraph at pages 3 and 4 of the amended petition, Bohemian denies generally and specifically each and all said allegation.

5. Answering the first full paragraph at page 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED BENEFICIAL INTEREST OF PETITIONERS

6. Answering the first paragraph of paragraph 1 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the second paragraph of paragraph 1 of the amended petition, Bohemian admits that certain wholesaler petitioners have already sought and been refused authorization from distillers to act as importers of their brands under A.B. 499; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies

generally and specifically each and all said allegations. Answering the second sentence of the second paragraph of paragraph 1 of the amended petition, Bohemian admits that were A.B. 499 enforced, wholesalers who have not been designated by any brand owner could not import into California branded distilled spirits; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the second paragraph of paragraph 1 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED CAPACITY OF RESPONDENT

7. Answering the first sentence of paragraph 2 of the amended petition, Bohemian admits that respondent BAXTER RICE is the duly appointed director of the Department of Alcoholic Beverage Control and is charged by law with administering and enforcing, among other things, the provisions of the Alcoholic Beverage Control Act; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of paragraph 2 of the amended petition, Bohemian admits that, commencing on January 1, 1980, respondent BAXTER RICE was, but for the issuance of the alternative writ of mandate herein, required to enforce Business & Professions Code § 23672, as amended by A.B. 499; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED STATEMENT OF FACTS

8. Answering the first sentence of the first paragraph of paragraph 3 of the amended petition, Bohemian admits that a substantial portion of distilled spirits consumed in

California are produced outside of California, and are imported into the state; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the first paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first and second sentences of the second paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the second paragraph of paragraph 3 of the amended petition, Bohemian admits that there is included in the moving papers Exhibits A-1 through A-5, all of which exhibits speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the fourth sentence of the second paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth sentence of the second paragraph of paragraph 3 of the amended petition, Bohemian admits that Seagram, National Distillers, Heublein, Hiram Walker, Schenley, Brown-Foreman, Bacardi, Fleishmann, Somerset, Gordon/Renfield, Jim Beam, Glenmore, Liggett, Buckingham, and Foremost-McKesson, plus several others, market nationally advertised brands of distilled spirits; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the sixth, seventh and eighth sentences of the second paragraph of paragraph 3 of the amended petition,

Bohemian admits that Exhibits A and B are included in petitioners' moving papers and that such exhibits speak for themselves; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the third paragraph of paragraph 3 of the amended petition, Bohemian admits that on or about May 30, 1978, the California Supreme Court issued an opinion in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585 (1978), which opinion speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the third paragraph of paragraph 3 of the amended petition, Bohemian admits that former Business & Professions Code § 23672 speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the third paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits and alleges that after the *Rice* decision, the Department of Alcoholic Beverage Control did not enforce §23672 of the Business and Professions Code; except as expressly admitted and/or alleged, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that after the *Rice* decision, some wholesalers began purchasing nationally advertised brands of distilled spirits from jobbers in the State

of Oklahoma where there is an affirmation law; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically and each and all said allegations. Answering the third sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that wholesalers, including some petitioners, who have not been designated by brand owners pursuant to A.B. 499, have been importing spirits into California and reselling to retailers; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fourth sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibits D, E and G speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the fifth and sixth sentences of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that the *Rice* court observed California retail liquor prices to be at that time the highest in the nation; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the seventh sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit B speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the eighth sentence of the fourth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian admits that generally in California wholesale distributors, such as itself, who have been designated by brand owners pursuant to A.B. 499 are supplied directly by the distillers, *i.e.*, brand owners, but that wholesale distributors who have not been designated by brand owners are not supplied directly by distillers, *i.e.*, brand owners; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit B speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the fourth and fifth sentences of the fifth paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the sixth sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the seventh sentence of the fifth paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations con-

tained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit C speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the third and fourth sentences of the sixth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit D speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the sixth and seventh sentences of the sixth paragraph of paragraph 3 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the eighth sentence of the sixth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit E speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the seventh paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the second, third and fourth sentences of the seventh paragraph of paragraph 3 of the amended petition Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fifth and sixth sentences of the seventh paragraph of

paragraph 3 of the amended petition, Bohemian admits that Exhibits D, E and G speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the seventh sentence of the seventh paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the eighth paragraph of paragraph 3 of the amended petition, Bohemian admits that after the passsage of the A.B. 499, some wholesalers, including some petitioners, were denied authorization from the major distillers to import their brands of distilled spirits into California; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of the eighth paragraph of paragraph 3 of the amended petition, Bohemian admits that Exhibit F speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the eighth paragraph of paragraph 3 of the amended petition, Bohemian admits that those wholesalers who were refused authorization to import from major distillers cannot pursuant to A.B. 499 import the brands of those brand owners into California; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first, second and third sentences of the ninth paragraph of paragraph 3 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED BASIS FOR RELIEF

9. Answering the first sentence of the first paragraph of paragraph 4 of the amended petition, Bohemian admits that absent a restraining order of the Court, respondent would have been required to enforce A.B. 499 as of January 1, 1980; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the first paragraph of paragraph 4 of the amended petition, Bohemian admits that absent a restraining order of the Court, respondent would be required to commence disciplinary proceedings against those petitioners who have not been designated by brand owners, should such petitioners continue to import branded spirits of brand owners who have chosen not to designate them; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first and second sentences of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fourth, fifth and sixth sentences of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the seventh sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 20-28 of petitioners' memorandum of points and authorities ("memo") speak for themselves, except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the eighth, ninth and tenth sentences of the second paragraph of par-

agraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the eleventh sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 28-34 of the memo speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the twelfth, thirteenth, fourteenth and fifteenth sentences of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the sixteenth sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 12-13 of the memo speak for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations. Answering the seventeenth sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the eighteenth sentence of the second paragraph of paragraph 4 of the amended petition, Bohemian admits that pages 34-42 of the memo speaks for themselves; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first and second sentences of the third paragraph of paragraph 4 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED INADEQUACY OF OTHER REMEDIES

10. Answering the first and second sentences of the first paragraph of paragraph 5 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the third sentence of the first paragraph

of paragraph 5 of the amended petition, Bohemian admits that some wholesalers including some petitioners, have sought and have been refused the authorization from major distillers to act as importers of their brands; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the fourth sentence of the first paragraph of paragraph 5 of the amended petition, Bohemian admits that A.B. 499 speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all said allegations.

Answering the first, second, third and fourth sentences of the second paragraph of paragraph 5 of the amended petition, Bohemian admits that Constitution Article III, §3.5 speaks for itself; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first and second sentences of the third paragraph of paragraph 5 of the amended petition, Bohemian admits that *Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd.*, 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979), speaks for itself; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

Answering the first, second, third, fourth and fifth sentences of the fourth paragraph of paragraph 5 of the amended petition, Bohemian admits that applicable sections of the Business & Professions Code speak for themselves; except as expressly admitted, Bohemian lacks sufficient informa-

tion or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED IRREPARABLE DAMAGE THREATENED

11. Answering the first sentence of paragraph 11 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second sentence of paragraph 11 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

ANSWER RE CLAIMED REASON FOR ORIGINAL APPLICATION TO HIGHER COURT

12. Answering the introductory sentence, *i.e.*, the first paragraph of paragraph 7 of the amended petition, Bohemian admits that California Rules of Court, Rule 56(a)(1) speaks for itself and hereby incorporates the foregoing answers to paragraphs 1 through 6 of the amended petition as though set forth at length; except as expressly admitted or otherwise incorporated herein, Bohemian denies generally and specifically each and all said allegations.

Answering the first, second, third and fourth sentences of the second paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the third paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the second sentence of the third paragraph of paragraph 7 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained

therein, and on that ground, denies generally and specifically each and all said allegations. Answering the third sentence of the third paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations.

Answering the first sentence of the fourth paragraph of paragraph 7 of the amended petition, Bohemian admits that since petitioners' attack is facial, a trial on the facts is unnecessary; except as expressly admitted, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations. Answering the second and third sentences of the fourth paragraph of paragraph 7 of the amended petition, Bohemian denies generally and specifically each and all said allegations. Answering the fourth sentence of the fourth paragraph of paragraph 7 of the amended petition, Bohemian admits that the *Rice* case speaks for itself; except as expressly admitted, Bohemian denies generally and specifically each and all of said allegations.

Answering the fifth paragraph of paragraph 7 of the amended petition, Bohemian lacks sufficient information or belief to answer the allegations contained therein, and on that ground, denies generally and specifically each and all said allegations.

FIRST AFFIRMATIVE DEFENSE

13. The amended petition, and each claim therein, does not state facts sufficient to constitute grounds for relief nor any cause of action.

SECOND AFFIRMATIVE DEFENSE

14. A.B. 499 does not improperly delegate to private parties that state's exclusive power to license the importation of alcoholic beverages into the state.

THIRD AFFIRMATIVE DEFENSE

15. A.B. 499 does not constitute an improper delegation.

FOURTH AFFIRMATIVE DEFENSE

16. A.B. 499 does not deprive petitioners of procedural or substantive due process in violation of Article I, §7 of the California Constitution, nor Fifth and Fourteenth Amendments to the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

17. A.B. 499 is neither preempted by the federal antitrust laws, the Sherman Act, the Clayton Act, the Federal Trade Commission Act, nor the Federal Alcoholic Administration Act (which is not an antitrust law).

SIXTH AFFIRMATIVE DEFENSE

18. A.B. 499 does not deprive petitioners of equal protection of the laws under Article I, §7 of the California Constitution, nor under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Bohemian prays for judgment as follows:

1. That the alternative writ of mandate and stay order issued herein on December 31, 1979 be discharged.

2. That A.B. 499 be declared effective and immediately operative.

3. That petitioners take no relief by virtue of the amended petition herein.

4. That Bohemian recover its costs and attorneys' fees in this action.

5. That the court grant such other and further relief as it may deem just and proper.

Dated: January 21, 1980

Wyman, Bautzer, Rothman & Kuchel
Frank Rothman
Christina A. Snyder
George Miron, of Counsel
By /s/ Frank Rothman
Frank Rothman
Attorneys for Intervenor
Bohemian Distributing
Company

(Declaration of service by mail and verification omitted in printing).

12. Return of Intervenor Wine & Spirits Wholesalers of California to Alternative Writ by Way of General Demurrer and Answer, Filed January 21, 1980, in California Court of Appeal.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT.

NORMAN WILLIAMS COMPANY, etc., et al.,
Petitioners,

vs. **3 Civil 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,
Respondent.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation, and BOHEMIAN DISTRIBUTING COMPANY, a California corporation,
Intervenors.

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of California

DEMURRER

Intervenor Wine & Spirits Wholesalers of California (hereinafter "Wholesalers Association") hereby demurs generally to the Amended Petition, filed herein on November 20, 1979, on the following grounds:

1. The Amended Petition fails to state facts sufficient to state a cause of action against Wholesalers Association; and

2. This Court lacks subject matter jurisdiction to consider the federal antitrust claims raised in the Amended Petition.

DATED: January 21, 1980.

Respectfully submitted,
Ball, Hunt, Hart, Brown and Baerwitz
By /s/ Joseph A. Ball
JOSEPH A. BALL
WILLIAM T. CHIDLAW
A Professional Corporation
By /s/ William T. Chidlaw
WILLIAM T. CHIDLAW
Attorneys for Intervenor
Wine & Spirits Wholesalers of California

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Pursuant to Code of Civil Procedure, Section 1089, a party upon whom an alternative writ has been served may make a return by "demurrer, verified answer or both." Appellate Rule 56(c) of the California Rules of Court is to the same effect. Since this case should be decided as a matter of law and because the Amended Petition is defective and objectionable on its face, Wholesalers Association has filed the instant demurrer.

By their Amended Petition, petitioners *facially* challenge the constitutionality of Business and Professions Code, Section 23672, as amended by A.B. 499 (hereinafter "Designation Statute"), on several alleged bases, which are summarized generally as follows:

(1) The Designation Statute is not supported by legitimate governmental purposes and therefore petitioners imply that the Designation Statute violates due process;

(2) The Designation Statute unlawfully delegates to brand owners of distilled spirits state power "to regulate importation of liquor;"

(3) Assuming a delegation of power to brand owners, the Designation Statute violates due process and is improper because it lacks sufficient safeguards against abuse in the exercise of the power;

(4) The Designation Statute deprives petitioners of equal protection of the laws by (a) creating a distinction between designated importers and undesignated importers, and (b) imposing restrictions on importers of distilled spirits without imposing similar restrictions on importers of wine and beer; and

(5) The Designation Statute is inconsistent with and preempted by federal antitrust laws.

Wholesalers Association heretofore has briefed extensively the legal issues in this case in its Opening Memorandum and Supplemental Memorandum; and in support of its return to the alternative writ, Wholesalers Association has filed herewith another memorandum which discusses at length certain legal issues raised in petitioners' Reply Memorandum and Amended Petition. Rather than repeat its legal arguments here, Wholesalers Association incorporates herein by reference the legal points and authorities contained in its above memoranda and summarizes generally its legal contentions advanced by the demurrer as follows:

(1) The Designation Statute was enacted under the authority of the Twenty-First Amendment to the United States Constitution, is supported by legitimate governmental purposes, and does not violate due process;

(2) Leading California Supreme Court cases on delegation of legislative power conclusively establish that the Designation Statute *delegates no power* to brand owners;

(3) Even if petitioners could show a delegation of power to brand owners, safeguards against abuse exist in the purposes for the statute, the applicability of the Sherman Antitrust Act and the regulatory power of the Department of Alcoholic Beverage Control;

(4) The Designation Statute creates rational classifications designed to further legitimate governmental functions consistent with the dictates of the Federal and State Equal Protection Clauses;

(5) This Court lacks subject matter jurisdiction to consider petitioners' federal antitrust challenge to the Designation Statute because exclusive jurisdiction of such claim resides with the federal courts; and

(6) Apart from the jurisdictional issue, petitioners' federal antitrust contention will not withstand analysis because

(a) there is no irreconcilable conflict between the Designation Statute and the federal antitrust laws, (b) the "state action" exemption to the Sherman Act is applicable in this case, and (c) the Designation Statute is a valid exercise of the State's authority under the Twenty-first Amendment to the United States Constitution.

Based on the foregoing, Wholesalers Association respectfully submits that this Court should sustain the demurrer.

DATED: January 21, 1979.

Respectfully submitted,

Ball, Hunt, Hart, Brown and Baerwitz

By /s/ Joseph A. Ball

JOSEPH A. BALL

WILLIAM T. CHIDLAW

A Professional Corporation

By /s/ William T. Chidlaw

WILLIAM T. CHIDLAW

Attorneys for Intervenor

Wine & Spirits Wholesalers of California

ANSWER OF INTERVENOR WINE & SPIRITS WHOLESALERS OF CALIFORNIA TO AMENDED PETITION FOR WRIT.

(Filed Concurrently With Demurrer)

Intervenor Wine & Spirits Wholesalers of California ("Wholesalers Association" herein) answers for itself alone the Amended Petition for Writ of Mandate and/or, in the Alternative, Prohibition and/or Certiorari ("Amended Petition" herein) as follows:

1. Answering the first paragraph on page 2, Wholesalers Association denies that A.B. 499 is unconstitutional.

2. Answering the second paragraph on page 2, Wholesalers Association admits the allegations contained therein.

3. Answering the first paragraph on page 3, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association alleges that:

(a) It has no information or belief sufficient to enable it to answer the allegation that "[a]pproximately 90% of the distilled spirits consumed in California are nationally advertised brands produced by large out-of-state distilling companies" and, basing its denial on that ground, denies said allegation;

(b) There are six major designated importers of nationally-advertised brands in Northern California, six in Southern California and one in Central California, who collectively sell approximately 70 percent of the wholesale volume of distilled spirits in California. Wholesalers Association further alleges that there are in excess of 30 designated importers of nationally-advertised distilled spirits in California and in excess of 100 designated importers of distilled spirits of all kinds in California.

(c) Designated importers of nationally advertised brands are required by California law to post with the Department of Alcoholic Beverage Control the prices at which they sell distilled spirits to retail licensees. (Bus. & Prof. Code § 24756.) Designated importers are legally obligated under California's three-tier system of distribution (Business and Professions Code §§25500, *et seq.*) to *independently* post such prices and, in fact, do independently post such prices.

4. Answering the second paragraph commencing on page 3, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association alleges that:

(a) Business and Professions Code §23672, as amended by A.B. 499 (the "Designation Statute" herein), recognizes the right of brand owners to select the importers who will carry their products;

(b) It has no information or belief sufficient to enable it to answer the allegations that petitioners sell liquor to retailers at prices "significantly below" the prices suggested by distillers in that, among other things, the term "significantly" is imprecise and vague. Basing its denial upon that ground, it denies said allegations. However, Wholesalers Association further alleges that petitioners have recently posted some prices for top-of-the-line brands at prices lower than the prices at which the franchised wholesalers have been selling the same brands to retail licensees in accordance with posted prices.

(c) The letters constituting the correspondence between the wholesaler petitioners and certain brand owners or distillers [which letters are contained in Exhibit F to petitioners' original petition filed herein] appear to be copies of authentic correspondence; and on that basis, Wholesalers Association admits that those distillers who are referred to in said correspondence are

apparently presently satisfied with their presently designated importers and do not desire presently to either take away any existing designation or add any new ones.

(d) The Designation Statute, by supporting a stable intra-brand distribution system, enhances interbrand competition among competing nationally advertised brands of distilled spirits.

(e) Under A.B. 570, which became effective as Business and Professions Code §23673 on January 1, 1980, licensed California wholesalers of distilled spirits will receive the benefit of the lowest prices at which any nationally advertised brand of distilled spirits is offered anyplace else in the United States. Thus, the Designation Statute, if it is permitted to operate in conjunction with Business and Professions Code §23673, will afford California wholesalers the benefit of the lowest prices at which distilled spirits are offered in the country and thus will permit California wholesalers the opportunity of passing through any resultant cost savings to retailers.

5. Answering the first paragraph commencing on page 4, Wholesalers Association denies each and every allegation contained in said paragraph in the conjunctive as well as the disjunctive and specially denies that the statute is unconstitutional on any of the grounds alleged in said paragraph, or on any other ground.

6. Answering the second paragraph commencing on page 4, Wholesalers Association admits the allegations contained therein, except that Wholesalers Association alleges that it has no information or belief sufficient to enable it to answer the allegations that "GREENE CAT, AULDRIDGE, PIERCE and KIRBY each currently have monthly gross sales of distilled spirits of under $17,000 [or any other sum] and obtain supplies from time to time from one or

more of the wholesaler petitioners'' and, basing its denial upon that ground, denies said allegations.

7. Answering the first paragraph commencing on page 5, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association incorporates herein by this reference the allegations of paragraph 3(a) and 4(c) of this answer.

8. Answering the last paragraph commencing on page 5, Wholesalers Association admits the allegations contained therein.

9. Answering the first paragraph commencing on page 6, Wholesalers Association admits the first sentence of said paragraph and denies each and every allegation contained in the second sentence of said paragraph, except that Wholesalers Association alleges that there currently is ''very little intrabrand price'' difference but there is 'intrabrand price competition'' at the wholesale level; Wholesalers Association further alleges that there is substantial interbrand price competition and price difference at the wholesale level.

10. Answering the second paragraph commencing on page 6, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges on information and belief that the distillers identified in said paragraph are 15 of the largest distillers in the United States, but Wholesalers Association has no information or belief sufficient to enable it to answer the allegations contained in said paragraph concerning the current market shares of said distillers and, basing its denial upon that ground, denies said allegations;

(b) Admits that the publications identified in said paragraph are standard industry sources for market data and that Exhibits A-1 through A-5 are extracts there-

from;

(c) Alleges that the 15 companies identified in said paragraph and a substantial number of others market nationally advertised brands of distilled spirits;

(d) Incorporates herein by this reference the allegations of paragraph 3(a) of this answer;

(e) Alleges that it has no information or belief sufficient to enable it to answer the allegations that "[t]he remaining 10% consists of numerous small 'private label' brands which are not nationally advertised" and, basing its denial upon that ground, denies said allegations.

11. Answering the first paragraph commencing on page 7, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that on May 30, 1978, the Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585 (1978) ("*Rice*" herein), held that Business and Professions Code §24755 was invalid because it was in conflict with the Sherman Act;

(b) Admits the allegations in the second sentence of said paragraph insofar as they state the substance of the language of the statute and alleges that Business and Professions Code §23672 so provided until its amendment by A.B. 499, effective January 1, 1980;

(c) Admits the allegations in the last sentence of said paragraph, but alleges that it has no information or belief as to whether any petitioner ever sought to become an authorized importer prior to the adoption of A.B. 499.

12. Answering the last paragraph commencing on page 7, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that under Oklahoma law, distillers are required to sell distilled spirits to any and all licensed wholesalers (or jobbers) in Oklahoma and that Oklahoma wholesalers are authorized to sell distilled spirits out-of-state to "qualified persons";

(b) Admits that after the decision in *Rice*, the wholesaler petitioners began purchasing nationally advertised brands of distilled spirits from wholesalers in the State of Oklahoma, imported said spirits into California and resold them to California retailers;

(c) Alleges that it has no information or belief sufficient to enable it to answer the allegation that petitioners have been selling imported spirits to retailers at prices "significantly below" the prices at which franchised wholesalers sell to retailers and, basing its denial upon that ground, denies said allegation;

(d) Alleges that *at least some* of the prices for distilled spirits posted by petitioners have been lower than the prices posted by franchised wholesalers for the same product;

(e) Alleges that it has no information or belief sufficient to enable it to answer the allegation that California retail liquor prices "have now fallen to a level below the national average" and, basing its denial upon that ground, denies said allegation;

(f) Alleges that it has no information or belief sufficient to enable it to answer the allegation that independent wholesalers like petitioners "now handle about ten to fifteen percent of the volume of major distilled spirits distributed in the State," and, basing its denial upon that ground, denies said allegation; Wholesalers Association further alleges that the total volume of sales of distilled spirits from wholesale to retail in California is slightly lower for the nine months from January to September 1979 as compared with January to September 1978. The total volume of sales of dis-

tilled spirits from wholesale to retail in California is higher for the month of August, 1979 than August of 1978. The total volume for July of 1979 is lower than for July of 1978. The total volume for September of 1979 is lower than September of 1978. The total volume for October of 1979 is higher than for October of 1978. The reason for the difference from month to month is the amendment this past year in Rule 100 which changed the posting period from 30 days to 60 days. Many retailers are now making most of their purchases of distilled spirits in the latter 30 days of the 60-day period thus distorting a year-to-year, month-by-month comparison of sales;

(g) Admits that Exhibit B is a true and correct copy of the Monthly Reports of the California State Board of Equalization for distilled spirits excise tax payments for the months June, 1978 through May, 1979;

(h) Admits the last sentence of said paragraph but alleges on information and belief that the wholesaler petitioners infrequently sell distilled spirits imported from Oklahoma jobbers to small family-owned retailers or other small retailers and frequently fail to provide satisfactory service or delivery to small retailers to whom they purport to have offered to sell such distilled spirits.

(i) Alleges on information and belief that much of the distilled spirits purchased by the nondesignated California importers from Oklahoma wholesalers is diverted in transit, and the merchandise never in fact enters Oklahoma.

13. Answering the paragraph commencing on page 8, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Admits the first sentence of said paragraph;

(b) Alleges that some designated importers are

larger and some are smaller than nondesignated importers;

(c) Alleges that designated importers sell approximately 80 percent of the *wholesale* volume of distilled spirits in California;

(d) Alleges that many distillers have between three and six designated importers in the Southern and/or in the Northern marketing areas of California;

(e) Alleges that the importers identified by petitioners in said paragraph are designated importers whose principal places of business are in the geographical areas specified, that they account for approximately 70 percent of wholesale volume in the state and that there are a number of additional designated importers in California;

(f) Alleges that designated importers are unrestricted as to the geographic areas in which they may sell distilled spirits to retail licensees.

14. Answering the paragraph commencing on page 9, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Admits that Exhibits D and E are true and correct copies of excerpts from the periodicals identified in said paragraph and that *Patterson's California Beverage Journal* (hereinafter "*Patterson's*") is a standard industry compilation of price data;

(b) Alleges that *Patterson's* contains wholesale price data which has been obtained from the postings made by licensed wholesalers in the Southern California area pursuant to Business & Professions Code §24756;

(c) Alleges that Exhibit C includes documents containing prices suggested by certain distillers and that from time-to-time such documents are distributed to some wholesalers by some distillers;

(d) Incorporates herein by this reference the alle-

gations of paragraph 3(c) of this answer.

(e) Alleges that the prices reflected in *Patterson's*, relied upon by petitioners, are prices which have been posted pursuant to Business and Professions Code §24756, generally prior to the time wholesalers adjust their posted prices to meet competition, as authorized by Department Rule 100(e) and (f);

(f) Alleges that franchised wholesalers sell at the prices which they post with the Department of Alcoholic Beverage Control and which are specified in *Patterson's* and *Beverage Industry News Merchandiser*, subject to adjustments for purposes of meeting competition as authorized by Department Rule 100(e) and (f).

15. Answering the paragraph commencing on page 10, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that it has no information or belief sufficient to enable it to answer the allegations that "[t]he cost to the independent wholesalers is several dollars per case above that paid by the franchisees (because of the Oklahoma jobber's markup and additional freight)" and that "[t]he independents must also pay cash" and, basing its denial upon that ground, denies said allegations;

(b) Alleges on information and belief that, as a general practice, designated importers have established credit terms with distillers;

(c) Alleges that at least some of the prices posted by nondesignated importers are lower than prices posted by designated importers for the same product;

(d) Admits that Exhibit G is a true and correct copy of certain price postings by petitioner Norman Williams Company;

(e) Alleges that it has no information or belief sufficient to enable it to answer the allegation that "[p]rice

competition from the independents has produced a reduction in the 'suggested' wholesale prices over the last year in many fast-moving brands'' and, basing its denial upon that ground, denies said allegation.

16. Answering the first paragraph commencing on page 11, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association incorporates herein by this reference the allegations of paragraph 4(c) of this answer.

17. Answering the second paragraph commencing on page 11, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that the first sentence of said paragraph is speculative and that it has no information or belief sufficient to enable it to answer the allegations of said sentence, and, basing its denial upon that ground, denies said allegations;

(b) Incorporates herein by this reference the allegations contained in paragraphs 3 (c) and 3(d) of this answer.

18. Answering the third paragraph commencing on page 11, Wholesalers Association admits the allegations contained therein, except that Wholesalers Association denies that the Designation Statute is unconstitutional.

19. Answering the paragraph commencing on page 12, Wholesalers Association denies each and every allegation contained therein, in the conjunctive as well as the disjunctive.

20. Answering the paragraph commencing on page 13, Wholesalers Association denies each and every allegation contained therein, in the conjunctive as well as the disjunctive, except that Wholesalers Association incorporates

herein by this reference the allegations contained in paragraph 4(c) of this answer.

21. Answering the first paragraph commencing on page 14, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Incorporates herein by this reference the allegations contained in paragraph 4(c) of this answer;

(b) Admits that the Designation Statute provides no administrative review of private action by distillers and alleges that no such review is required by law.

22. Answering the second paragraph commencing on page 14, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association:

(a) Alleges that under §3.5 of Article 3 of the California Constitution, administrative agencies are not authorized to declare a statute unenforceable or to refuse to enforce it on the ground that it is unconstitutional unless an appellate court has first determined that it is unconstitutional;

(b) Admits the allegations contained in the last two sentences of said paragraph.

23. Answering the first and second paragraphs commencing on page 15, Wholesalers Association admits the allegations contained therein.

24. Answering the third paragraph commencing on page 15, Wholesalers Association denies each and every allegation contained therein and alleges that none of petitioners has any long-term business or business relationship with any out-of-state supplier of major brand distilled spirits.

25. Answering the first paragraph commencing on page 16, Wholesalers Association denies each and every allegation contained therein and specially denies that it is either

proper or necessary for a writ to issue from the California Supreme Court or from any other court.

26. Answering the second paragraph commencing on page 16, Wholesalers Association denies each and every allegation contained therein, except that Wholesalers Association admits that this proceeding involves the constitutionality of a statute of statewide effect.

27. Answering the first two paragraphs commencing on page 17, Wholesalers Association denies each and every allegation contained therein, in the conjunctive as well as the disjunctive, except that Wholesalers Association alleges that on the basis of the issues as framed by the petitioners, a trial on the facts is unnecessary.

28. Answering the first paragraph commencing on page 18, Wholesalers Association admits the allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

29. The Amended Petition fails to allege facts which constitute or state a cause of action.

SECOND AFFIRMATIVE DEFENSE

30. To the extent the Amended Petition is based on the alleged preemption of the Designation Statute by the Sherman Act, or by any other federal antitrust law, including but not limited to the Clayton Act, the Federal Alcohol Administration Act or the Federal Trade Commission Act, this Court lacks subject matter jurisdiction over the claims alleged by petitioners. The federal courts have exclusive subject matter jurisdiction over such claims. Moreover, petitioners lack standing to assert a claim based on the latter three Acts.

THIRD AFFIRMATIVE DEFENSE

31. Petitioners allege that the Designation Statute serves legitimate and compelling governmental purposes, is constitutional and is not preempted by federal law. However, if the Court determines that the Designation Statute is constitutionally deficient in any respect, the Department of Alcoholic Beverage Control should be given an opportunity to promulgate regulations, consistent with the purposes of the Alcoholic Beverage Control Act (Business and Professions Code §23000 *et seq.*), to cure any such deficiency.

FOURTH AFFIRMATIVE DEFENSE

32. Although it is true that the prices for distilled spirits, from distillers to wholesalers have been generally higher since the *Rice* case. Wholesalers Association alleges on information and belief that there is no instance when the price of distilled spirits to a designated wholesaler in California has been raised because of or in anticipation of the passage into law of AB 499. Wholesalers Association further alleges on information and belief that such increases were based on increased costs, inflation and other factors affecting the distillers' profitability.

FIFTH AFFIRMATIVE DEFENSE

33. Wholesalers Association alleges on information and belief that there never has been a cancellation of the designation of a distilled spirits importer to import distilled spirits into California by any distiller because of any alleged failure to adhere to or follow "suggested prices," and there never has been any threat, coercion or suggestion by any distiller that unless suggested prices were followed, the designation would be withdrawn or the distributorship cancelled.

SIXTH AFFIRMATIVE DEFENSE

34. Wholesalers Association alleges on information and belief that much of the distilled spirits purchased by the nondesignated California importers from Oklahoma wholesalers is diverted in transit, and the merchandise never in fact enters Oklahoma.

WHEREFORE, Wholesalers Association prays for judgment as follows:

1. That the Alternative Writ of Mandate herein be discharged and that the Stay heretofore issued by the Court be dissolved;

2. That the Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari be denied;

3. That the Court hold that the Designation Statute is valid and enforceable and free from any constitutional infirmities and that it is a valid exercise of the State's power, derived from the Twenty-first Amendment, to regulate the importation of alcoholic beverages into California.

4. That Wholesalers Association be awarded its costs of suit herein;

5. That petitioners' request for attorney's fees be denied;

6. That the Court grant such other and further relief as it may deem just and proper.

DATED: January 21, 1980

Ball, Hunt, Hart, Brown and Baerwitz
By /s/ Joseph A. Ball
JOSEPH A. BALL

William T. Chidlaw
A Professional Corporation
By /s/ William T. Chidlaw
WILLIAM T. CHIDLAW

Attorneys for Intervenor Wine &
Spirits Wholesalers of California

13. Order of the Supreme Court of the United States Granting Petitions for Writ of Certiorari, Filed November 30, 1981.

RE: Baxter Rice, Director, Department of Alcoholic Beverage Control of California v. Norman Williams Company, et al., No. 80-1012; Bohemian Distributing Company v. Norman Williams Company, et al., No. 80-1030; and Wine & Spirits Wholesalers of California v. Norman Williams Company, et al., No. 80-1052.

* * *

"The motion of United States Brewers Association for leave to file a brief as *amicus curiae* in case No. 80-1012 is granted. The motion of Lloyd H. Robertson, etc., et al. for leave to file a brief as *amici curiae* in case No. 80-1012 is granted. The motion of Wine & Spirits Wholesalers of America, Inc., et al. for leave to file a brief as *amici curiae* is granted. The petitioners for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument."

14. Contents of Appendices to Petitions for Writ of Certiorari, Respectively, of Baxter Rice, Department of Alcoholic Beverage Control, of Wine & Spirits Wholesalers of California and of Bohemian Distributing Company. These Appendices have not been reprinted but are incorporated by reference and itemized herein.

1. The following documents may be found in the appendix to the Petition for Certiorari of Baxter Rice, Director, Department of Alcoholic Beverage Control of the State of California, No. 80-1012:

Opinion below of the Court of Appeal of the State of California, Third Appellate District, July 17, 1980 ..... Pet. 1

Material relating to raising of federal questions ..... Pet. 37

2. The following documents may be found in the appendix to the Petition for Certiorari of Bohemian Distributing Company, No. 80-1030:

Opinion below of the Court of Appeal of the State of California, Third Appellate District, July 17, 1980 ..... Pet. 1a

Order of the Supreme Court of the State of California denying petition for hearing, September 24, 1980 ..... Pet. 16a

U.S. Const. Amend. XXI, section 2 ..... Pet. 17a

Pertinent provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.* (1975) ..... Pet. 18a

Pertinent provisions of the California Business & Professions Code ..... Pet. 19a

Pertinent provisions of the Oklahoma Alcoholic Beverage Control Act, 12 Okla. Stat. tit. 37, § 501 *et seq.* (1978) ..... Pet. 24a

Pertinent provisions of the Kansas Statutes, Kan. Stat. § 41-101 *et seq.* as added or amended by House Bill 2020. ..... Pet. 26a

Primary source laws of the various states .. Pet. 37a

3. The following documents may be found in the appendix to the Petition for Certiorari of Wine & Spirits Wholesalers of California, No. 80-1052.

Opinion below of the Court of Appeal of the State of California, Third Appellate District, July 17, 1980 ..... Pet. 1

Order of the Supreme Court of California denying petition for hearing, September 24, 1980 Pet. 18

Relevant Oklahoma statutes and regulations Pet. 19

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Nos. 80-1012, 80-1030, 80-1052

Office-Supreme Court, U.S.
FILED
FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

BOHEMIAN DISTRIBUTING COMPANY,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA,
a California corporation,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

On Petitions for Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review a state court decision invalidating a state statute, where that decision was based on a finding that the state had no regulatory interest in the statute?

2. Is there a *per se* violation of the Sherman Act when two parties agree to prohibit a third party from importing liquor which the latter has legally purchased outside the state?

3. Has not *California Retail Liquor Dealers' Ass'n v. Midcal,* 445 U.S. 97 (1980) (*"Midcal"*), established that the Sherman Act preempts a state liquor statute under which, without any valid regulatory purpose, the state expressly authorizes and enforces a *per se* violation of the Sherman Act by private parties?

4. Given *Midcal,* may a state rely upon the Twenty-first Amendment to justify enforcement of private agreements between distilling companies and selected wholesalers which bar otherwise legal importation by other licensed wholesalers?

5. Does the "state action" exemption to the Sherman Act insulate from preemption a California statute which, without provision for any state review or supervision, allows private distilling companies to prohibit wholesalers from engaging in interstate commerce?

6. Should this Court review a state court decision invalidating a state statute which is not only fundamentally unfair, but also unconstitutional on independent federal grounds, including:

a. The state statute deprives a state-licensed liquor importer of due process in violation of the Fifth and Fourteenth Amendments because it delegates to another private party the virtual power to revoke the importer's license

without specifying any criteria or standards and without providing for a hearing, review or appeal.

b. The state statute deprives state-licensed liquor importers of equal protection of the law in violation of the Fourteenth Amendment because it discriminates on the basis of consent from a private party.

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Nos. 80-1012, 80-1030, 80-1052

In the Supreme Court

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BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,
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On Petitions for Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

I

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

In the proceeding below,[1] the California Court of Appeal

[1]Opinion reported at *Norman Williams Co. v. Rice*, 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980).

invalidated California Assembly Bill (A.B.) 499,[2] which would have delegated to private distillers the power to determine who may import liquor into California. Under the statute, "designation" agreements between a distiller and his chosen California wholesaler would have prohibited other fully licensed wholesalers from importing liquor lawfully purchased from a source other than the distiller. Discerning no state regulatory interest to justify such an anticompetitive restriction, the state court found that A.B. 499 was inconsistent with and preempted by the federal antitrust laws. The California Supreme Court refused to review or disturb this decision.

The state court's decision was compelled by this Court's unanimous decision in *California Retail Liquor Dealers' Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (hereinafter *"Midcal"*). *Midcal* has settled the law in this area, and the instant case presents issues almost identical to those presented in *Midcal*. Just as it was a *per se* violation of the Sherman Act in *Midcal* for the fair trade statute to give a brand owner of wine the power to set minimum retail prices for the brand in California, it is a *per se* violation for A.B. 499 to empower a brand owner of liquor to prohibit a wholesaler from importing branded liquor which has been legally purchased from a third party. In fact, A.B. 499 goes beyond fair trade in its anticompetitive effect: the distiller has more than the mere power to control the prices; he can actually decide who can compete. Applying the interest-balancing test prescribed in *Midcal*, the state court found no state interest which counterbalanced the statute's blatant interference with the national policy in favor of competition.

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[2]Cal. Stats. 1979, Ch. 280 § 1, amending Cal. Bus. & Prof. Code § 23672.

Contrary to Intervenors'[3] contentions, *Midcal* and long established principles of preemption confirm that there is no "right" to enact a state liquor statute inconsistent with the Sherman Act, particularly where (as here) the state's own courts have determined that the statute is utterly devoid of a valid state regulatory purpose. By distorting the meaning of certain dictum in *Midcal* in such a way that the dictum swallows the holding, the Intervenors attribute unlimited sweep to the Twenty-first Amendment and predict that the decision below will create uncertainty and confusion regarding the validity of laws similar to A.B. 499 in other states. In fact, *Midcal* was a strong statement that the scope of state power under of the Twenty-first Amendment is limited by the Sherman Act. *Midcal* held that the Amendment did not save fair trade from preemption, but one would think from reading the Intervenors' petitions that *Midcal* had come out the opposite way. *Midcal* requires that state and federal interests must be balanced on a case-by-case basis, and gives great weight to a state court's evaluation of the relative interest of the state.

---

[3]As in *Midcal*, the Petitioners pressing this Court to second-guess the state court's finding of no state interest include private parties who intervened in the proceedings below and who represent the very importers who would be unfairly benefited if the distillers were allowed to erect barriers to free interstate competition (hereinafter referred to as "Intervenors"). Because the California courts could discern no valid state interest in the statute, it is also questionable whether the petition filed by the California Attorney General truly represents the interests of the state. In fact, the commitment of Respondent Baxter Rice, Director of Dept. of A.B.C. of the state, to this statute is dubious since he neither sponsored nor supported this measure in the state legislature. Because the State Attorney General and the state courts are at odds on this matter, the brief of he Attorney General is largely addressed to the balance and separation of powers between the California courts and the California legislature, an issue certainly inappropriate for this Court to consider.

Under the *Midcal* rule, the lower courts may now balance the respective interests in each particular case. There is thus no need for this Court again to address its attention to the overall balance between the Twenty-first Amendment and the Sherman Act, nor is there need for it to strike the balance in each case, particularly where, as here, the state court itself could discern no valid state regulatory interest.

The Intervenors also unsuccessfully attempt to suggest something worthy of this Court's time in the purported inconsistency between the decision below and *Grant-Billingsley Wholesale Liquor Co. v. Lennen*, 49 U.S.L.W. 3331 (11/3/80), hereinafter *"Grant-Billingsley,"* dismissed by this Court for want of a substantial federal question. Because *Midcal* has specified that the lower courts are to balance federal interests and state interests on a case-by-case basis, the fact that a court has balanced these interests in the Kansas regulatory context differently from a California court in the radically different California regulatory environment hardly means that there is inconsistency in the fundamental law to be applied.

The Intervenors also futilely attempt to attack the state court's opinion on the basis of a remarkable misreading of *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Citing *Sylvania,* they contend that the state court erred in concluding that A.B. 499 authorizes a *per se* violation of the Sherman Act. While it is correct that *Sylvania* abolished the *per se* rule against territorial restrictions imposed by a manufacturer on his own franchisee-distributor, *Sylvania* does not empower a distiller to do what A.B. 499 authorizes: to enter into agreements which prohibit

interstate commerce by *a third party* in goods purchased neither from the distiller nor his franchisee. Although a distiller may impose reasonable territorial restrictions on his own franchisees and terminate a franchisee who violates such restrictions, nothing in *Sylvania* authorizes a distiller or his franchisee to prevent the interstate movement of goods by a third party who has legally purchased those goods outside the franchise system.

The statute amended by A.B. 499 originally was part of California's fair trade apparatus. In *Rice v. A.B.C. Appeals Bd.*, 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P. 2d 476 (1978) (hereinafter *"Rice"*), the California Supreme Court held that California's liquor fair trade laws were preempted by the Sherman Act. Although review of *Rice* was never sought in this Court, the reasoning in *Rice* was subsequently endorsed by this Court in *Midcal,* which invalidated California's wine fair trade laws. *Rice* did not scrutinize § 23672, but the Director of the California Department of ABC decided that *Rice* rendered the original version of § 23672 unenforceable because the power to designate was delegated to the party posting the fair trade prices, a party which, after *Rice*, could not exist legally.

Respondents (Petitioners below) are wholesalers and retailers of distilled spirits. The wholesaler Respondents are fully licensed by the state to import. Prior to *Rice*, these wholesalers had never been able to import major national brands (which constitute 90% of California consumption) because they had never been designated as importers under § 23672 by the oligopoly of big distillers (e.g., Seagram, Hiram Walker, Heublein, Schenley) who produce or market such major brands. After *Rice*, however, the wholesaler Respondents began to purchase the major brands for importation in Oklahoma, whose law requires distillers selling spirits in that state to sell to all licensed Oklahoma wholesalers, who, in turn, may resell to "qualified persons"

outside the state, such as the Respondents. Oklahoma, in other words, has a "no franchise" rule, and provides a fully legal source of major national brands outside the franchise system.

Respondents and the Oklahoma wholesalers observe all reporting, regulatory and tax requirements of the States of Oklahoma and California and of the U.S. Bureau of Alcohol, Tobacco and Firearms as to the interstate movement of this liquor. These rules and requirements are, in fact, exactly the same as those applied to sales of liquor by the distillers to their franchisees. As noted in the opinion below, the only significant difference is that the Respondent wholesalers sell to licensed retailers in California at prices significantly below those charged by the designated or franchised wholesalers, who invariably charge the prices "suggested" by the distillers. A.B. 499, however, would have resurrected the power which the distiller formerly had under fair trade to exclude such discounting wholesalers from the state. One practical effect of A.B. 499, then, would be to insulate the franchised wholesalers from the only true price competition they presently face. It is, in short, fair trade though the back door.

II

ARGUMENT

A. THE COURT BELOW CORRECTLY CONCLUDED THAT THE DESIGNATION STATUTE WOULD ENFORCE PRIVATE CONDUCT WHICH IS PER SE VIOLATIVE OF THE SHERMAN ACT

In an opinion firmly anchored in *Midcal*, the California Court of Appeal ruled that A.B. 499 is preempted by the Sherman Act because the state statute would authorize and enforce a *per se* violation of the Sherman Act. A state may not allow, authorize or enforce private agreements or

practices which are *per se* illegal under the Sherman Act. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386-89 (1951); *Rice*, 579 P.2d at 482.[5]

1. Effect of the Designation Process on Competition

It is important to understand the operation and effect of a designation under A.B. 499. The statute contemplates that each distiller or brand owner would agree with one or more California importers or wholesalers to sell his brand to the wholesaler and to authorize the wholesaler to import the brand into California. In the absence of the statute, such an agreement between a distiller and a wholesaler would have no effect on importers who could legally obtain the same brand from some source other than the distiller, such as an Oklahoma wholesaler.

By operation of A.B. 499, however, anticompetitive consequences result from such a private agreement. If the distiller entered into designation agreements with one or two wholesaler-importers and did nothing else, the legal consequence would be that all other wholesaler-importers would be prohibited from importing the brand, even if they may lawfully obtain the brand without restriction from someone other than the distiller. The statute does more than merely recognize the distiller's right to sell to whomever he pleases. It transforms his agreement to designate and sell to an importer into an *automatic* prohibition on importation by others of goods in which the distiller has no property right or ownership interest. The statute *requires* the distiller

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[5]*Schwegmann* invalidated a Louisiana fair trade law which allowed but did not compel liquor distributors to impose minimum prices. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), relied upon by Intervenors, does not overrule or modify this aspect of *Schwegmann*. Bohemian erroneously contends that the state court below did not find a *per se* violation. The state court in fact held that A.B. 499's delegation to a private party of the power to forbid interstate commerce was in "direct contravention of the express terms of . . . the Sherman Act." 166 Cal. Rptr. 570.

to enter into designation agreements. The *necessary* effect of a designation agreement under the statute is to exclude non-designated importers. The State of California would enforce this exclusionary agreement by private parties.

A designation agreement between a distiller and a designated California importer is thus a naked restraint on interstate commerce between two other parties, an Oklahoma wholesaler and another California importer, who in a free market would be legally able to import liquor into California. In other words, private parties would be allowed and empowered by the State to enter into agreements which exclude others from the market.

2. Designation Agreements Should Be Prohibited by a Per Se Rule

This Court has delineated some general tests and criteria for determining whether to apply the *per se* rule to anticompetitive practices. In *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 5 (1958), the Court held that *per se* illegal practices under the Sherman Act are those "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Another definition of *per se* violations was stated in *White Motor Co. v. U.S.*, 372 U.S. 253 at 263, 9 L. Ed. 2d 738, 746, 83 S. Ct. 696 (1963): "naked restraints of trade with no purpose except stifling of competition." In *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 692 (1978), practices were said to be *per se* illegal if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."

Applying the above guidelines for *per se* rules to designation agreements, it is readily apparent that no elaborate

industry analysis is required to demonstrate the unequivocal anticompetitive character and operation of a designation agreement. The statute requires designations, and the necessary effect of designation is the outright exclusion of "non-designated" wholesalers who could otherwise legally compete. The theoretical possibility that a distiller may designate all importers licensed by the state should not remove designation agreements from the category of *per se* violations. As this court observed in *Catalano, Inc. v. Target Sales,* ..... U.S. ....., 64 L. Ed. 2d 580 at 586 (1980):

> "In any event, when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se.*"

A.B. 499 certainly contemplates that the distiller will designate less than 100% of the importers licensed by the state.[6] Otherwise, the statute would have been totally superfluous.

In general, an agreement between two or more parties depriving a third party of a source of supply is a *per se* violation. For example, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), a retailer's agreement with manufacturers of electrical appliances not to sell to the retailer's competitor was found to be *per se* illegal. Another "group boycott" case, *U.S. v. General Motors,* 384 U.S. 127, 148 (1966), provides a closer parallel to the

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[6]In *Joseph E. Seagram & Sons, supra,* relied upon by Petitioners, the shoe was on the other foot. There this Court found no preemption because the possibility of conflict between federal and state law was "entirely too speculative." 386 U.S. at 46. Here the possibility of no conflict is entirely speculative.

designation procedure in its anticompetitive effect. There, a group of Chevrolet dealers complained to General Motors about certain discount houses who were obtaining new Chevrolets from other Chevrolet dealers and selling them at extremely competitive prices. The first group of dealers obtained GM's agreement to prohibit the second group of dealers from reselling cars to the discounters. The Court noted that such a course of conduct was a "classic" restraint of trade, since it deprived the second group of dealers of their freedom to deal with the discounters if they so chose. 384 U.S. at 140. A designation agreement has exactly the same effect as the latter agreement, since the legal consequence of designation is to deprive the Oklahoma wholesalers of their freedom to sell to discounters in California who are competing with the designee.

> "Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins. . . . The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market . . . of a class of traders. Nor do we propose to construe the Sherman act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." 384 U.S. at 146-48.

See also Cernuto Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979).

The designation statute is likewise analogous to certain established *per se* violations where competition is excluded

through an exclusionary membership policy in a trade association. For example, in *Associated Press v. U.S.*, 326 U.S. 1 (1945), each of the 1,200 newspaper members of the Associated Press had the right under the Association's by-laws to veto the admission of its business competitor. Since the by-laws also prohibited sale of the Association's wire service to non-members, it was very difficult for a non-member to buy news. These exclusionary by-laws were found to be a *per se* violation. As in the *Associated Press* case, a wholesaler in the present case must become part of "the club"—i.e., he must be "designated"—before he can effectively compete.

The Intervenors misleadingly attempt to shoehorn designation agreements into the thoroughly eroded rule in *U.S. v. Colgate,* 250 U.S. 300 (1919). They contend that A.B. 499 merely confirms the unilateral right of each distiller to refuse to sell his brands to the Respondents. Such unilateral refusals are, of course, not judged under *per se* rules. However, the issue here is not, as the Intervenors erroneously contend, the freedom of the distillers to refuse to sell to Respondents, but whether the distillers should be allowed to prohibit Respondents from purchasing from a third party. Without A.B. 499, Respondents may lawfully acquire liquor from third parties in Oklahoma and import it into California despite the distillers' refusal to sell directly to them. Respondents do not contend that federal law requires that the distillers sell directly to them. Respondents have a source of supply independent of the distillers, with which A.B. 499 would allow the distillers to interfere. In other words, A.B. 499 is not designed to allow the distiller to dispose freely of his own property; it allows him to interfere with someone else's free disposition of *his* own property.

3. Respondents Need Not Show That the Operation of the Statute Fits Exactly into a Previously Established Per Se Violation

The state court did not establish a new *per se* violation; it simply concluded that designation fell under the already well-delineated *per se* rule against agreements which "deprive others of access to merchandise which the latter wish to sell to the public." *U.S. v. General Motors, supra,* 384 U.S. at 146.

It is the ultimate in legal formalism to suggest that designation must be on all fours with a *particular* previously defined *per se* violation before it can be found to be inconsistent with the Sherman Act. This Court has made it quite clear that there is no immutable list of *per se* illegal practices. The Sherman Act is to be applied flexibly to whatever anticompetitive devices and artifices are created through the ingenuity of those who believe they can reap gains by insulating themselves from competition. *National Society of Professional Engineers v. U.S., supra,* 435 U.S. 679, 688 (1978).

This Court has continued to give shape to the mandate of the Sherman Act by identifying anticompetitive practices which fit into the category of conduct which is so exclusionary as to be deemed illegal without further inquiry, most recently in *Catalano, Inc., et al. v. Target Sales, Inc., supra,* ..... U.S. ....., 64 L. Ed. 2d 580 (1980). Were lower courts constrained to apply *per se* rules only in situations where the practice under consideration was on all fours with some particular previously defined *per se* violation, antitrust violators could easily evade the law by slight modifications to practices previously declared illegal.

4. Sylvania Condones Restrictions Only on Franchisees, Not on Third Parties Outside the Franchise System

In a futile attempt to demonstrate that designation agreements are not a *per se* violation, the Intervenors argue that designation is analogous to territorial restrictions on franchisees, dealt with in *Continental T.V., Inc. v. GTE Sylvania, Inc., supra,* 433 U.S. 36 (1977) (hereinafter *"Sylvania"*). In that case, the Court held that a territorial restriction imposed by a manufacturer on his franchisee should be judged under the rule of reason analysis rather than a *per se* rule. The Court found that such restrictions, while they concededly impaired intra-brand competition (between Sylvania's distributors), *may* have redeeming benefits.[7]

A.B. 499 is not analogous to *Sylvania,* because A.B. 499 restrictions act on different parties than do *Sylvania* restrictions. The rule of reason in *Sylvania* may well allow a distiller to prohibit his own franchisee from reselling his brand to a third party in another state. But if branded goods are legally available to a third party from a non-franchisee (e.g., an Oklahoma wholesaler), *Sylvania* does not allow the manufacturer to go to the border and directly prohibit such a third party from carrying the goods over state lines. A.B. 499 authorizes the latter type of prohibition on a third party who is outside the franchise system.

Sylvania, in other words, stands for the principle that a manufacturer may impose reasonable territorial restrictions on the operations *of his own franchisee* as a con-

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[7]*Sylvania* did not find such restrictions to be *per se* legal. Such restrictions may still violate the Sherman Act if they in fact unreasonably restrain trade and provide no demonstrable benefit to interbrand competition.

dition to selling to that party directly. Should the franchisee violate such restrictions, the manufacturer may terminate the franchise. Such restrictions may be imposed on franchisees without A.B. 499. *Sylvania,* however, does not give the distiller any direct power *over third parties* dealing in goods which have left *or never entered* the franchise system. If such third parties may legally obtain the manufacturer's goods in spite of the manufacturer's restrictions on his franchisees (or may obtain goods from wholesalers who, like the Oklahoma jobbers, are not franchisees), *Slyvania* creates no remedy against the interstate movement of such goods in the hands of such third parties.[8]

Although the distillers object to Oklahoma's "no-franchise" rule, they nonetheless find it profitable to market their brands in Oklahoma. Having chosen to enter the Oklahoma market, they have put their goods beyond their own franchise system and its restrictions. Oklahoma jobbers may freely and legally resell the goods to third parties like Respondents. Having voluntarily let the goods leave the franchise system, the distillers may not now seek in *Sylvania* a justification for erecting barriers at state lines to commerce in such goods by third parties who are not franchisees and who have obtained the goods without contractual restriction.

Sylvania can provide no support for the validity of A.B. 499 for the additional reason that the designation process automatically imposes restrictions which are industry-wide rather than narrow and selective as in

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[8]Neither does *Adolph Coors Co. v. A&S Wholesalers,* 561 F.2d 807 (10th Cir. 1977), cited by the Attorney General, create such a remedy. In that case, a preliminary injunction obtained by a brewer against a non-franchisee transporting the brewer's brand in interstate commerce was found to be wrongful and was dissolved. 561 F.2d at 809, 811.

Sylvania. *Sylvania* involved a restriction on intrabrand competition imposed by a single company which was struggling to maintain a 1-2% share of the national television market against strong interbrand competition from RCA and others. 433 U.S. at 38. The designation process is, however, not narrowly targeted to benefit only those competitors who actually need it to strengthen themselves in interbrand competition. A.B. 499 would be an industry-wide restriction on intrabrand competition for all brands and companies, weak and strong, including such entrenched giants as Seagrams, with 20% of the national market. Such giants hardly need to be strengthened as interbrand competitors.[9]

5. There Are No Redeeming or Pro-competitive Benefits from A.B. 499

While the exclusionary effects of designation agreements are obvious, it is equally obvious that there are no counterbalancing benefits from the statute which would warrant removing it from the *per se* illegal category. The California Court of Appeal's opinion noted that the designation process does not serve any of the purportedly noble goals or purposes conjured up by the Intervenors to justify it, such as monitoring of imports, facilitation of tax auditing (see below pp. 29-30), the prevention of integration of the manufacturing and wholesaling functions (see below pp. 19-20), the preservation of small retailers, or the promotion of temperance.

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[9]For example, territorial restrictions were found to be unreasonable and illegal in *Eiberger v. Sony Corp.*, 622 F.2d 1068 (2d Cir. 1980), where it was said that Sony's market share of 12% in dictating equipment "completely undercuts" its argument that vertical restrictions were necessary to strengthen the company in interbrand competition. *Id.* at 1081.

Erroneously invoking the policy considerations discussed in *Sylvania,* Intervenors claim that the restrictions which A.B. 499 imposes in int*ra*brand competition will promote int*er*brand competition and that, because of this redeeming virtue, A.B. 499 should not be judged under a *per se* rule. Intervenors' argument is essentially that the exclusion of discounting importers and the consequent maintenance of high prices will encourage the franchisees to undertake promotional and advertising activities. This argument ignores the fact that one of the express purposes of the California Alcoholic Beverage Control Act is the promotion of temperance. Cal. Bus. & Prof. Code § 23001. Since more advertising carries the danger of encouraging more drinking, there can be no merit to the claim that the legislature intended to encourage more advertising.

The other possible kinds of enhancement of interbrand competition involved in *Sylvania* are likewise absent here. *Sylvania* dealt with the television industry, where it is important to product quality to encourage franchisees to invest in facilities for warranty service. 433 U.S. at 55. The reputation of a brand of television often depends on the easy availability of such services. While it may be important to protect a television dealer from intrabrand competition from discounters who sell the television but do not provide the warranty services, such services are totally unnecessary in the liquor industry. No one needs warranty service on his Scotch bottle.

The *factual* contention that suppression of int*ra*brand price competition in the California liquor industry would in any way enhance int*er*brand competition was specifically considered by the California Supreme Court in *Rice.* Based on detailed statistics and other evidence as to past prices, that Court concluded that suppression of intrabrand price competition actually *impaired* interbrand price competition in the California liquor market. In fact,

the California Supreme Court concluded that uniform intrabrand pricing for liquor tends to encourage uniform interbrand pricing. 579 P.2d at 491-2, 21 Cal. 3d at 454-56.[10] Because of high concentration in the distilling industry in America and the huge market shares held by the major national brands, the encouragement of vigorous intrabrand competition is clearly important.

B. THE STATUTE IS NOT SAVED FROM PREEMPTION BY THE TWENTY-FIRST AMENDMENT OR THE STATE ACTION EXEMPTION

1. An Interest-Weighing Analysis Should Be Used

In deciding that A.B. 499 was not saved from preemption by the Twenty-first Amendment, the California Court of Appeal again reached a result compelled by *Midcal*. While the states obviously possess a large measure of control over the regulation of liquor, *Midcal* holds that state and federal powers over liquor must be harmonized in an interest-weighing analysis where "the national policy in favor of competition" is balanced against the state's own regulatory interests. *Midcal*, 445 U.S. at ....., 63 L. Ed. 2d at 240. The courts of the State of California itself have concluded that while A.B. 499 would completely undermine the policies embodied in the Sherman Act, it at the same time would serve *no* legitimate state regulatory goals. As noted in *Midcal*, great weight should be given to the state court's evaluation of the relative regulatory interest of the state in such statutory programs. 445 U.S. at ....., 63 L. Ed. 2d at 247.

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[10] *Sylvania* does not hold that suppression of intrabrand competition will automatically enhance interbrand competition. To the contrary, the *Sylvania* court held that the degree of intrabrand competition and interbrand competition is totally independent. *Sylvania*, 433 U.S. at 52 n. 19. Each case must be analyzed on its own facts.

The balance struck by the state court is reinforced by California Constitution Article XX, § 22, which expressly acknowledges the supremacy of federal interests over state interests in the regulation of importation of liquor into California:

> "The State of California . . . *subject to the laws of the United States regulating commerce between foreign nations and among the states* shall have the exclusive right and power to regulate the importation into and the exportation from the State, of alcoholic beverages."[11] (Emphasis added)

Any interest-weighing analysis under *Midcal* must take into account the California Constitution's own acknowledgment of the preeminent federal power in this area. But the significance of Art. XX, § 22, goes even further. If a California statute regulating the importation of liquor is inconsistent with the Sherman Act, the federal statute must prevail as a matter of California law. Art. XX, § 22 of course gives the lie to Intervenors' contention that California can claim a "right" to enact a statute like A.B. 499, which is inconsistent with a federal statute enacted under the Commerce Clause. Even if California can be said to have such a "right" under Federal law, it has specifically waived this right in its own constitution.

2. The Midcal Dictum

Despite its inconsistency with the Sherman Act and with the provisions of Article XX, § 22, the Intervenors nonetheless maintain that A.B. 499 is saved from preemption by the Twenty-first Amendment. In making this contention they have seized upon the following dictum from the *Midcal* opinion:

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[11]Article XX, § 22, was adopted by initiative on November 8, 1932, *after* Congress had passed the Twenty-first Amendment.

> "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal, supra*, 445 U.S. at ....., 63 L. Ed. 2d at 246.

Intervenors claim that the present case is distinguishable from *Midcal* because A.B. 499 purportedly concerns whether to permit importation and how to structure the distribution system, while the wine fair trade statutes invalidated in *Midcal* concerned some other aspect of regulation. In essence, Intervenors argue that the *Midcal* balancing test is not to be applied to statutes which in any way concern importation or distribution.

In interpreting this dictum, the California court believed that the reference to a state's "virtually complete control over *whether to permit importation or sale*" self-evidently refers only to the power of the state to prohibit the importation or sale of liquor *entirely*, 108 Cal. App. 3d at 359, 166 Cal. Rptr. at 570. One of the primary purposes of the Twenty-First Amendment was to allow a state to remain dry if it so chose. 76 CONG. REC. 4141 (remarks of Sen. Blaine, sponsor of the amendment in the Senate). The state court justifiably concluded that once a state has decided to allow the importation and sale of liquor by private parties, the Twenty-first Amendment cannot justify a blatantly anticompetitive scheme of regulation which furthers no legitimate state regulatory purpose. In such a case, the state's regulatory interest, here considered by the state court to be unsubstantiated, is outweighed by the pro-competition goals of the Sherman Act. 108 Cal. App. 3d at 359, 166 Cal. Rptr. 573.

Neither can A.B. 499 be defended as an attempt to "structure the liquor distribution system." This language in *Midcal* obviously reconfirms that a state has the power to

adopt such "structures" as a state monopoly, *see, e.g., Midcal*, 445 U.S. at ....., 63 L. Ed. 2d 243 n.9, or a "three-tier system," i.e., separate and independent ownership of the manufacturing tier, the wholesaling tier, and the retailing tier. However, the relation of A.B. 499 to "structure" is remote at best. The principal claim that the statute is "structural' in nature is that it is designed to preserve the three-tier system. Rejecting this contention, the California court found that, by giving the distillers more control over the wholesale level, the statute is actually counterproductive to the state's goal of preventing integration of manufacturers and wholesalers. 166 Cal. Rptr. at 571 n.11. Without A.B. 499, the free importation of Oklahoma liquor allows at least some wholesalers to be truly independent of the distillers, as contemplated in the three-tier requirement. While the three-tier requirement, which exists in California law independently of A.B. 499, is obviously directed at "structure," A.B. 499 is not. Excluding certain independent competitors at the wholesale tier does not "structure" a three-tier system, nor does it effectuate any other type of "structure."

Intervenors' reliance on the Twenty-first Amendment is also misplaced because that amendment is directed to guaranteeing the *state* a place in regulating interstate commerce in liquor. The present case involves not the state itself as a regulator but a private system of regulation, which is unsupervised by the state. See below pp. 21-22 and 25-27.

If the *Midcal* dictum indeed means that the *Midcal* preemption analysis does not apply to statutes pertaining to distribution and importation, as Intervenors contend, the dictum would swallow the holding in *Midcal*. Certainly, the fair trade statute in *Midcal*, which made it illegal to sell except at a specified price, was a measure affecting distribution. In fact, the *Midcal* opinion itself recognized that one of the principal *purported* purposes of the fair trade stat-

utes (which they did not achieve) was to preserve a distribution system of small retailers from price competition from large discount houses. *Midcal*, 445 U.S. at ....., 63 L. Ed. 2d at 248. Likewise, the wine price maintenance statutes invalidated in *Midcal* also regulated the terms of importation,[12] because these statutes empowered out-of-state suppliers of wine to control retail prices in California for their brands when imported into the state. Because *Midcal* itself dealt with a statute directed at certain aspects of distribution and importation, it is readily apparent that Intervenors' reading of the *Midcal* dictum is far too expansive.

3. The State Action Exemption

Having dealt with the Twenty-first Amendment, the court below proceeded to the issue of whether A.B. 499 was saved from preemption by the "state action exemption" to the antitrust laws. *Midcal* held that this exemption would not be triggered unless there was some active supervision by the state with respect to the regulatory scheme. The A.B. 499 regulatory scheme, as held by the court below, cannot be construed to be state action. The state has simply delegated regulation to private parties without providing standards for the regulation of competition and without overseeing or reviewing in any way the choices made by the private parties.[13]

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[12]Cal. Bus. & Prof. Code § 24867, required out-of-state brand owners of wine to "designate in writing one licensee who imports the brand of wine to make and file a fair trade contract . . . ." Although this section was not explicitly at issue in *Midcal*, it was in effect invalidated by *Midcal*.

[13]Intervenors argue that there is a possibility that such active supervision may be provided by the state in the future in the form of amplifying regulations. However, the Director of the California Department of ABC has already issued regulations pertaining to A.B. 499 (Appendix F to Wine & Spirits Wholesalers' petition), and

Intervenors' argument that the state court's decision will become precedent for declaring all state licensing schemes unconstitutional is totally without merit. State-administered licensing schemes are of course immune from Sherman Act preemption if the licensing authority is the state itself and not unsupervised private delegates.

C. GRANT-BILLINGSLEY HAS CREATED NO CONFUSION OR INCONSISTENCY IN THE LAW

Intervenors erroneously attempt to find authority for their position in this Court's dismissal of the appeal in *Grant-Billingsley*. Whatever similarity the issues in *Grant-Billingsley* may have to the present case, the dismissal of the appeal in *Grant-Billingsley* for want of a substantial federal question is not entitled to the same precedential value or "deference given a ruling after briefing, argument, and a written opinion." *Caban v. Mohammed*, 441 U.S. 380, 391 n.9 (1979).[14] In view of this, there is no danger that *Grant-Billingsley* will have the effect of blurring the clear, strong and complete statement of the law made by this Court in *Midcal*.

The general rule that dismissals of appeals have little precedential weight should apply with particular force here because an examination of the briefs in support of the motion to dismiss in *Grant-Billingsley* confirms that

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these regulations contained no provision for supervision or review by the state of the private designation agreements. Because there is no indication that the Director will issue further regulations, this Court should not consider this purely hypothetical possibility that the infirmities in the statute may be cured.

[14]Similarly, in *Edelman v. Jordan*, 415 U.S. 651, (1974) this Court held that a summary affirmance, while of some precedential value, was "obviously . . . not of the same precedential value as would be an opinion of this court treating the question on the merits." 415 U.S. at 671. *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

that motion was argued largely on the basis of the factual record in that case. Moreover, the Kansas and California courts arrived at radically different evaluations of their own state's regulatory interest in the respective statutes.

Grant-Billingsley involved an appeal from a decision of the Kansas Supreme Court upholding over a Sherman Act challenge a Kansas state liquor statute which requires exclusive territorial brand franchises. The Kansas Supreme Court opinion, *sub nom. Colby Distributing Co., Inc. v. Lennen,* 227 Kan. 2d 179, 606 P.2d 102 (1980), deals not with the Kansas Primary Source Law but with this exclusive territorial franchise provision. The opinion analyzed the latter statute in relation to the peculiar conditions of the Kansas market. Based on the factual record in the Kansas trial court, the Kansas Supreme Court saw the statute as a cure to some of the purported inefficiencies of the prior Kansas system of regulation, which had involved price control (a fixed markup) at the wholesale level, an apparent duplication of inventories and higher costs.

It was precisely this factual record and the peculiarities of the Kansas market which were argued to this Court as justification for dismissing the appeal in *Grant-Billingsley.* The Attorney General of Kansas argued that Kansas, the state of Carey Nation, had perhaps the strongest prohibitionist tradition and nearly the *lowest consumption of alcohol per capita* of any state. California is at the opposite extreme, with per capita consumption nearly twice that of Kansas. A mostly rural state with low consumption like Kansas obviously has different regulatory problems than California. The optimum way to encourage vigorous interbrand competition in these two markets can be critically different. In Kansas it may be difficult to ensure a wholesaler a profitable volume unless he has an

exclusive territory, something that is not true in California.[15] Citing *Midcal,* the appellees in *Grant-Billingsley* argued that this Court should defer to the state court findings as to a state's regulatory interest.

In *Midcal* this Court had noted that it customarily accepts the factual findings of state courts as to the state's regulatory interest in the absence of "exceptional circumstances." 445 U.S. at ....., 63 L. Ed. 2d at 247. One crucial difference between the present case and *Grant-Billingsley* is the result of the state court's own evaluation of the state's regulatory interest in the statutes concerned. In the present case, as in *Midcal,* the state courts could identify no California regulatory interests served by the statute. On the other hand, the Kansas court in *Grant-Billingsley* had found, on the basis of the factual record before it, that the Kansas statute was achieving a valid legislative purpose. Obviously, uniformity of decision does not require that California find a valid regulatory interest in A.B. 499 merely because a Kansas court did so in relation to a Kansas statute. Moreover, the State of Kansas has no state constitutional provision analogous to California Constitution Art. XX, § 22, whereby California acknowledges that its power to regulate the importation of liquor is "subject to" federal statutes enacted pursuant to the Commerce Clause.

There is no danger that lower courts will perceive the law in this area as confused. The present case and *Grant-Billingsley* are in fact a vivid demonstration of this Court's ruling in *Midcal* that the balance between federal and state regulatory interests must be analyzed on a case-by-case basis. It is predictable under *Midcal* that different statutes

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[15]Appendices to the motion to dismiss of the Kansas Attorney-General presented detailed statistics which purported to establish the actual effect of the exclusive franchise provision.

in different states may produce different results. *Midcal* certainly did not intend to stamp uniformity among states with differing regulatory problems.

The differing factual findings and evaluations of the state's regulatory interest by the state courts of Kansas and California are not binding on each other. While the California court's opinion is persuasive and well reasoned, other state courts are free, as was Kansas, to make their own evaluation of their own state's regulatory interest in its liquor statutes.

D. DEPRIVATION OF DUE PROCESS

Even if this Court believes that there is, after *Midcal*, any uncertainty as to the proper balance between the Sherman Act and the Twenty-first Amendment, the present case is not a proper vehicle for clarifying the law of preemption in liquor regulation. This is because there are fundamental constitutional infirmities in A.B. 499 which extend considerably beyond its inconsistency with the Sherman Act. Because the present case was decided so soon after the *Midcal* decision and because it bears such a close resemblance to *Midcal*, the state court had strong reasons for anchoring its opinion solely in *Midcal*. However, the state court's opinion notes at several points the basic unfairness of allowing one group of businessmen to exclude their competitors. See, e.g., 166 Cal. Rptr. at 569, 570, 572. Such a private system of regulation tramples upon numerous constitutional guarantees. A.B. 499 violates both the Fifth and Fourteenth Amendments in that it denies both due process and equal protection of the law. Since the result below may be affirmed on these grounds, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), it would not be appropriate for this Court

to grant certiorari for the purposes of dealing with the law of preemption.[16]

A.B. 499 delegates the power to regulate importation to distilling corporations who have their own selfish interests with respect to the licensing of importers. These private parties are granted a power which they would not have absent the statute, namely the power to prevent an importer properly licensed by the state from importing goods which that importer has legally obtained in another state. This power may be exercised simply by refusing to designate an importer as "authorized." The statute, moreover, provides for no supervision or control by the state over the distillers' exercise of this delegated power. The state has thus given to private parties a virtual veto over its licensing process.

If the power to license importers is to be delegated to the distillers, due process requires that it be delegated in such a way as to protect prospective importers from arbitrary or capricious refusals to license. Since A.B. 499 superimposes a second tier of private licensing over the state's licensing process, the designation procedure should be subject to the same due process requirements otherwise applicable to the granting or revocation of liquor licenses. *Hornsby v. Allen,* 326 F.2d 605, 609 (5th Cir. 1964), con-

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[16]There is still another federal ground supporting the result below which this Court will have to consider if certiorari is granted: that A.B. 499 was preempted by Section 5a of the Federal Alcohol Administration Act, [27 U.S.C. § 205]. Respondents also argued that California Const. Art. XX, § 22 (quoted above, p. 18) flatly prohibits *any* delegation to private parties of the power to regulate importation, and that A.B. 499 violates the due process and equal protection provisions of the California Const. Even if this Court reversed the decision below it would be appropriate to remand to the state court for consideration of these independent state law grounds.

firmed that due process applies to the granting or denying of liquor licenses, and this Court reconfirmed in *Midcal*, 445 U.S. at ....., 63 L. Ed. 2d at 245, that the Twenty-first Amendment does not remove liquor regulation from due process scrutiny. A.B. 499 violates due process in the following respects:

1. In *Gibson v. Berryhill*, 411 U.S. 564, 578-79, (1973), this Court found a denial of due process in a statute which, like A.B. 499, delegates the power to license to persons with a "substantial pecuniary interest" in the licensing process. 411 U.S. at 578-79.

2. A.B. 499 provides absolutely no regulatory criteria to limit the private delegate in his exercise of the power to designate. A distiller is free under the statute to refuse to designate on arbitrary or capricious grounds. *National Cable Television v. U.S.*, 415 U.S. 336, 342 (1974).

3. The statute fails to require a hearing or opportunity for review or appeal for an aggrieved importer who has been refused designation.

E. DENIAL OF EQUAL PROTECTION

A.B. 499 is also invalid because it discriminates between two groups of licensed distilled spirits importers. The two groups involved, i.e., wholesalers who are designated to import by the distillers and those who are not, are functionally indistinguishable from a regulatory standpoint. Both have been licensed by the state to import and have thus already met the minimum standards required by the state for importers. The only distinction between the two groups is whether they are in the good graces of another private party. Nonetheless, A.B. 499 permits "designated" importers to import major brand liquor into the state while denying the same privilege to all other licensed importers. This harsh line bears no relationship to an actual and legitimate legislative purpose.

This discrimination is so utterly devoid of any legitimate regulatory purpose that it cannot pass constitutional muster, even under the "rational basis" standard of review. The rational basis standard is not "toothless." *Trimble v. Gordon,* 430 U.S. 762, 767 (1977). In fact, in *Hornsby v. Allen, supra,* the rational basis standard was used to invalidate a similarly unfair liquor licensing statute. To like effect, *Midcal* summed up the law in this area by noting that states cannot "insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection." 445 U.S. at ....., 63 L. Ed. 2d at 245.

Numerous courts have confronted the precise issue of whether statutory discrimination between franchisees (i.e., "designees") and non-franchisees violates equal protection. Applying the "rational basis" standard of review to statutes which prohibited non-franchisees from selling new cars, *Joyner v. Centre Motor Co.,* 191 Va. 627, 66 S.E.2d 469 (S. Ct. App. Va. 1951); *Nelsen v. Tilley,* 137 Neb. 327, 289 N.W. 388 (S. Ct. Neb. 1939); *Rebsamen Motor Co. v. Phillips,* 226 Ark. 146, 289 S.W.2d 170 (S. Ct. 1956), found that such statutes unconstitutionally bestowed a special privilege on one class of businessmen.

> "The vice in and resultant unconstitutionality of this legislation is that it presupposes that unenfranchised dealers constitute a class who alone are capable of fraudulent and sharp practice, and that dealers who hold franchises are immune from and incapable of committing the wrongs and dishonest acts sought to be guarded against." *Joyner, supra,* 66 S.E.2d at 473-74.

Since no standards or criteria are specified in A.B. 499 for the choice of designees, it is difficult to see how designation will serve any coherent regulatory goal. Intervenors, however, argue that A.B. 499 has a rational basis

because it facilitates the tracing of imported distilled spirits and auditing for excise taxes. The legislative history of the statute is devoid of any reference to such an *actual* statutory purpose, and it is readily apparent that the statute does not serve these functions.

The state court concluded that without A.B. 499 the California liquor industry is already subject to a monitoring and auditing system which ensures that all legitimate federal and state informational interests are fully realized.[17] This system of reports and records, without A.B. 499, provides numerous cross-checks and independent verifications by which importation and taxation can be easily monitored in exhaustive detail. These reporting requirements apply equally to liquor acquired from the primary source (the distiller) or a secondary source (such as an Oklahoma jobber).

A.B. 499 provides for no additional information or records. The language of the statute itself thus utterly fails to support Intervenors' contention that the goal was one of information or auditing. If Intervenors' argument is that eliminating some competitors will reduce the administrative burden of auditing imports, the elimination should be made by the state itself and not by self-interested members of the industry.

The Intervenors also argue that the regulatory purpose of A.B. 499 is to allow California to foreclose intrusion on its "historic" or "established" channels of distribution from Oklahoma's "open wholesaling" system.

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[17]The complex web of state and federal controls includes California Department of Alcoholic Beverage Control (ABC) regulations, 4 Cal. Admin. Code, §§ 1, *et seq.*, California State Board of Equalization (SBE) regulations, 18 Cal. Admin. Code §§ 2500, *et seq.*, and U.S. Bureau of Alcohol, Tobacco, and Firearms (BATF) regulations, 27 C.F.R. §§ 194.221, *et seq.*

The "historic" channels to which Intervenors refer are those which existed under fair trade. Because Oklahoma liquor comes fully under the control of California's comprehensive import and tax auditing system, the California court found that California has no inherent regulatory interest in forestalling the side effects of the Oklahoma system. Oklahoma liquor no more "interferes" with California's regulatory system than does liquor imported by the designated importers, as to which the same reports, controls, verifications, inspections, and audits are available. It is obvious that the only threat from Oklahoma is not to California's regulatory system but to the private system of exclusion and high prices maintained by the distillers and their franchisees.

III

CONCLUSION

The court below correctly applied well-settled principles of constitutional and antitrust law. The petitions for certiorari should accordingly be denied, particularly because independent federal grounds support the result below.

Dated: February 20, 1981

Respectfully submitted,
FELDMAN, WALDMAN & KLINE

By GEORGE G. WEICKHARDT
Attorneys for Respondents

Office-Supreme Court, U.S.
FILED
12
MAR 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1012

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation, dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

THE STATE'S PRIMARY INTEREST IN THIS CASE IS TO PRESERVE ITS CONSTITUTIONALLY GRANTED RIGHTS UNDER THE TWENTY-FIRST AMENDMENT TO CONTROL THE IMPORTATION OF LIQUOR AND THE STRUCTURE OF THE LIQUOR DISTRIBUTION SYSTEM WITHIN ITS BORDERS

In an attempt to ward off the granting of certiorari in this case, respondents proffer the claims that the Attorney General does not truly represent the interests of the State and that the commitment of petitioner, the Director of Alcoholic Beverage Control, to the statute under consideration is dubious at best. (Respondent's Brief, p. 3, fn. 3.) Each of respondents' claims is false; they have no place in this case and should be ignored. Respondents have totally ignored the State's petition and pointedly addressed all their arguments only to the briefs filed by the two intervenors.

Obviously, respondents are trying to make the Court believe that the same situation exists here which occurred in California Liquor Dealers v. Midcal Aluminum, Inc. (Midcal), 445 U.S. 97 (1980), where only the Attorney General, as amicus, and not the Director, in any capacity, participated in briefing and argument before the Court. (See Midcal, fn. 12 at p. 111.)

Here, of course, unlike Midcal, the Director is the petitioner for certiorari; the Attorney General is his counsel. Both have participated from the inception of the case in the Court of Appeal, through the Petition for Hearing in the California Supreme Court, and now in this Court. Respondents have attempted to lower the case to the level of an inter-industry fight to divert attention from their true position, one where they, as disgruntled parties, are hoping to ultimately prevent the operation of a carefully considered and duly enacted statute.

The Attorney General and the Director of Alcoholic Beverage Control of the State of California, along with the Directors of similar departments in at least ten other states including Arizona, Colorado, Indiana, Kentucky, Nebraska, New Mexico, New York, North Carolina, North Dakota, and South Carolina, who have jointly filed an amicus curiae brief herein, are all extremely concerned that if the opinion of the California Court of Appeal is not overturned by this Court,

it will be the first stone in an avalanche of litigation which will completely destroy the liquor laws and regulations of every state in the union. That this is no idle fear is evidenced by the list of cases now pending which appears in footnote 2 of the other states' Amicus Brief at page 14. In this connection, it is exceptionally significant that one of the participating amici states is North Carolina, ". . . ' a control state,' wherein the state completely controls and operates the distribution and sale of liquor. . . ." (Other states' Amicus Brief, p. 2.)

Respondents' arguments highlight the problem which has resulted from their misinterpretation of Midcal. They refuse to recognize the plenary power granted to the states by the Twenty-first Amendment and confirmed by this Court (Respondent's Brief, p. 3). Rather, they claim that the Twenty-first Amendment only gives the states the right to determine whether they should be wet or dry (Respondent's Brief, p. 19.)

If the Court of Appeal's basic premise regarding the inter-relationship between the Sherman Act 1/ and the Twenty-first Amendment is accepted, the ineluctable conclusion is that if any liquor statute affects price; or restrains trade, no matter how remotely; or is perceived by a court to violate the "policy" behind the Sherman Act; then the state regulatory enactment is invalid. Under such an analysis every state liquor regulation would be in jeopardy. That cannot be the law.

II

THE IMPORTER DESIGNATION STATUTE UNDER CONSIDERATION IS FULLY WITHIN THE DIRECT LANGUAGE AND MEANING OF CALIFORNIA CONSTITUTION, ARTICLE XX, SECTION 22

Respondents, by only giving this Court a partial quote from the first sentence of California Constitution article XX, section 22, attempt to create the illusion that the California Constitution expressly acknowledges total federal

---

1. 15 United States Code section 1.

preemption in the area of liquor control. They make the amazing argument that if California has any rights under the Twenty-first Amendment, "it has specifically waived this right in its own Constitution" (Respondent's Brief, p. 18).

The entire sentence reads:

> "The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of

alcoholic beverages."

As becomes immediately obvious, the omitted first half of the sentence necessarily applies to the structure of the liquor distribution system, one of the basic issues in this case.

Assuming, arguendo, that the second part of the sentence, quoted by respondent, was inserted into the constitutional initiative by the California voters in order to immediately give back to the federal government anything which was given to the State by the Twenty-first Amendment, the argument is answered by the self-evident proposition that "the laws of the United States" are as interpreted by the pronouncements of this Court. Thus, not only is respondents' position not supported by the literal language of the California Constitution referred to by them; it likewise is not supported by the cases in this Court.

III

THIS COURT, NOT THE STATE COURT, IS THE ULTIMATE INTERPRETOR OF FEDERAL CONSTITUTIONAL ISSUES

Respondents argue that this Court should deny certiorari because the California Court of Appeal has declared state legislation invalid (Respondents' Brief, 3, fn. 3). Such a position is contrary to this Court's recent holding in State of Minnesota v. Clover Leaf Creamery Company (Clover Leaf), ___ U.S. ___ (No. 79-1171 Jan. 21, 1981 (49 L.W. 4111)).

In the instant case the Court of Appeal erroneously adopted the position that because the statute under consideration did not "clearly vindicate" State interests it could be set aside, particularly since there were various other existent ". . . provisions designed to insure that each legitimate state interest is fully recognized." (Appen. to Ptn. for Cert., p. 30.) In contrast, this Court has pointed out in Clover Leaf that:

". . . States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker'." (Citations omitted; 49 L.W. at p. 4113.)

". . . we reiterate that 'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.' [Citation.] Since in view of the evidence before the legislature, the question clearly is 'at least debatable,' [citation] the Minnesota Supreme Court erred in

substituting its judgment for that of the legislature." (49 L.W. at p. 4115.)

* * * *

CONCLUSION

Respondents have not met their burden in opposition to the Petition for Writ of Certiorari filed by the California Director of Alcoholic Beverage Control and the State Attorney General as his counsel. Their attempted minimization of the State's active participation in the case is not only contradicted by the record but is highlighted by the Amicus Curiae Brief in support of the petition filed by the liquor administrators of ten other states. Respondents' major point, that a part of a sentence in California Constitution article XX, section 22, has given back to the federal government full preemption in the area of liquor control, evanesces when the entire sentence respondents neglected to quote is read in full. Their contention, that the determination of the federal issues which that State Court of Appeal erroneously interpreted are strictly matters within the province of the local state courts, is totally countered by this Court's recent opinion in the Clover Leaf case. The other points they

raise have previously been fully answered by the briefs of petitioner, the intervenors, and other amici.

The Petition for Certiorari should be granted by this Court to stem the avalanche of litigation which is now arising because of misinterpretation of the Midcal case; to preserve the plenary power over liquor importation and structure of the liquor distribution system granted to the states by the Twenty-first Amendment; and to clarify the law relating to per se violations of the Sherman Act.

Respectfully submitted,

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Attorney General of the
State of California

GEORGE J. ROTH
Deputy Attorney General

By _____
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Deputy Attorney General

Attorneys for Petitioner
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GJR/lac

STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO) ss.

AFFIDAVIT OF SERVICE BY MAIL

Mary Lynn Hook, being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 555 Capitol Mall, Suite 350, Sacramento, California 95814; that on the 11th day of March, 1981, affiant enclosed three true copies of the within PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States mail at the City of Sacramento, County of Sacramento, State of California, with postage thereon fully prepaid; that there is delivery service United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed:

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Mary Lynn Hook

Mary Lynn Hook, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 11th day of March, 1981.

Janet E Chapp

NOTARY PUBLIC in and for the County of Sacramento, State of California.

MOTION FILED
JAN 26 1981

No. 80-1012

In the
Supreme Court of the United States
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Respondents.

On Writ of Certiorari to the Court of Appeals of the State of California Third Appellate District.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1012

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Now come the Chairmen, Directors, Commissioners, Chiefs and Superintendents of the following state liquor commissions:

Lloyd H. Robertson, Superintendent *Arizona* Department of Liquor Licenses and Control

James D. Sims, Chairman *Indiana* Alcoholic Beverage Commission

Phillip H. Weaver, Commissioner *Nebraska* Liquor Control Commission

Edward J. McLaughlin, Chairman Hugh B. Marius, Commissioner Dorothea M. Klajbor, Commissioner Robert E. Doyle, Commissioner Terrence R. Flynn, Commissioner *New York* State Liquor Authority

Robert E. Hanson, State Treasurer *North Dakota* State Treasurer's Office

Marvin D. Eller, Chief *Colorado* Department of Revenue Liquor Enforcement Division

Richard H. Lewis, Commissioner *Kentucky* Department of Alcoholic Beverage Control

James R. Baca, Director *New Mexico,* Alcoholic Beverage Control Board

Marvin L. Speight, Jr., Chairman *North Carolina* Board of Alcoholic Beverage Control,

a "control state"

Miller S. Ingram, Chairman *South Carolina* Alcoholic Beverage Control Commission

and hereby respectfully move for leave to file the attached brief amicus curiae in this case. The consent of the attorneys for the Petitioners has been obtained. However, the consent of the attorney for Respondents was requested but refused.

The amicus parties in this brief represent a "control state", wherein the state completely controls and operates the distribution and sale of liquor, and "open states", which permit private enterprise to operate the liquor business within the state, both of which are concerned with the confusion and danger that has resulted from the lower Court dicision.

The primary interest of the amicus parties is founded upon the power and authority delegated to the states under Section 2 of the Twenty-First Amendment of the Constitution of the United States, which authority is unclear and in jeopardy due to the decision of the lower court. The interest of the state liquor authorities is far broader than the specific "designation statute" reviewed by the lower Court.

The lower Court has established an anti-trust pre-emption test as a basis for challenging all enactments of a state under Section 2 of the Twenty-First Amendment. The broad theory of the Sherman Act — that trade should be free of artificial restraint — is in many respects incompatible with the policy of state liquor control legislation.

In applying the anti-trust pre-emption test, the lower Court relied upon *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which is the most important decision applicable to the beverage alcohol industry over the past twenty years. Originally, *Midcal* was decided by the same California Court of Appeals which decided *Williams*, wherein the Court of Appeals relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d, 431 (1978).

Therefore, there now exists a series of California decisions, the impact of which is already evident in cases now pending in other jurisdictions throughout the country. See *H. & H. Distributing Company* v. *Mississippi Tax Commission, et al.*, in the U. S. District Court, Southern District of Mississippi, Jackson Division; Case No. J 8-0323(N); *Mile-Hi Wholesale Liquors, Inc.* v.

Alan Charnes, Executive Director of the Department of Revenue of the State of Colorado, in the District Court, in and for the City and County of Denver, State of Colorado; *Walgreen Company, et al.* v. *Illinois Liquor Control Commission, et al.*, in the Circuit Court of the Twelfth Judicial Circuit, Kankakee County, Illinois, No. 8-MR-76; *M. H. Gordon and Sons, Inc.* v. *Alcoholic Beverage Control Commission, Commonwealth of Massachusetts*, Superior Court, Case No. 79-704. Thus, the lower Court decision, which has emanated from an "open state", has caused a series of challenges to the Twenty-First Amendment in both "open" and "control" states,[1] throughout the United States. Based upon these challenges, there is a need for an orderly judicial administration of pending and related litigation.

In its brief the amicus parties will demonstrate that the lower Court holding is in direct conflict with this Court's decision in *"Midcal"*, its earlier decisions related to the Twenty-First Amendment, and a recent Kansas Supreme Court decision in *Colby Distributing Co., Inc.* v. *Lennen*, 227 Kan. 179, 606 P. 2nd 102 (1980), which was summarily dismissed by this Court in *Grant-Billingsley Liquor Co., Inc.* v. *Michael C. Lennen*, 49 U.S. Lw. 3331 (Appeal dismissed for want of a substantial federal question).

The legislature is the policy maker of the State. Their discretion is broad and may not be overturned because a court may deem them unwise. The lower Court has in effect created a role whereby it will be the function of a court to speculate as to the propriety of state policy.

---

[1] *Fisher Foods, Inc.* v. *The Ohio Department of Liquor Control*, U. S. District Court, Third District of Ohio, C80-2381, filed December 29, 1980.

This prospect would endanger a network of regulations that combine and work together; it will decontrol a structure which is designed to protect the yield of millions of dollars in state revenue; it will cause confusion as to whether federal or state government is responsible for enforcement activities; it will destabilize 45 years of effective pervasive regulation and cause chaos in the meantime. In the instance of alcoholic beverages, the results are not responsive to protection of the health, safety and welfare of the public.

The constitutional arguments made in the amicus curiae brief are central to the disposition of this matter and it is believed that the brief which amicus curiae are requesting permission to file will contain a more complete argument on the constitutional issues raised. If this argument is accepted, it would be dispositive of this case.

Respectfully submitted,

Morton Siegel, Esq.
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Attorneys for Amicus Curiae.

No. 80-1012

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Respondents.

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAIRMEN, DIRECTORS, COMMISSIONERS, CHIEFS AND SUPERINTENDENTS OF THE STATE LIQUOR COMMISSIONS OF:

ARIZONA
COLORADO
INDIANA
KENTUCKY
NEBRASKA
NEW MEXICO
NEW YORK
NORTH CAROLINA
NORTH DAKOTA
SOUTH CAROLINA

The amicus parties are in support of the Petition for Writ of Certiorari, filed in this cause.

QUESTIONS PRESENTED

Whether or not the lower Court has substituted its judgment for that of the legislature, by rejecting a state policy on the basis of an anti-trust pre-emption test, which has placed in jeopardy the ability of the state to protect the health, safety and welfare of its citizens, as it relates to regulation of the alcoholic beverage industry pertaining to the following:

(a) the importation and transportation of alcoholic liquors within a state; and

(b) the structuring of the liquor distribution system within a state; and

(c) the delivery, sale, use or consumption of alcoholic liquors within a state; and

(d) the revenue of the State.

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No. 80-1012

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, a California corporation, etc., et al.,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of California Third Appellate District.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAIRMEN, DIRECTORS, COMMISSIONERS, CHIEFS AND SUPERINTENDENTS OF THE STATE LIQUOR COMMISSIONS OF: ARIZONA, COLORADO, INDIANA, KENTUCKY, NEBRASKA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA AND SOUTH CAROLINA, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Court of Appeal, Third Appellate District, is officially reported as *Norman Williams Co., et al.* v. *Rice,* 166 Cal. Rptr. 563 (1980); ptn. for hrg. den. Sept. 24, 1980.

JURISDICTION

The opinion of the Court of Appeal was entered on July 16, 1980. The California Supreme Court denied a timely Petition for Hearing on September 24, 1980. The Petition for Writ of Certiorari was filed on the 22nd day of December, 1980. The jurisdiction in this Court rests on 28 U.S.C. 1257(3).

INTEREST OF THE STATE

Pursuant to the Twenty-First Amendment of the United States Constitution, the State has the duty to administer, regulate and tax the alcoholic beverage industry in order to protect and promote the health, safety and welfare of the people of the State. In accordance with its duties, it is called upon to administer and enforce the statutes and regulations adopted under the Twenty-First Amendment as it pertains to the taxation, importation, transportation, distribution, delivery, sale, use and consumption of alcoholic liquors.

The amicus parties in this brief represent a "control state", wherein the state completely controls the distribution and sale of liquor, and "open states", which permit private enterprise to operate the liquor business within the state, both of which are concerned with the confusion and danger that has resulted from the case below. The lower Court decision, which has emanated from an "open state", has caused a series of challenges

to the Twenty-First Amendment in both "open" and "control" states, throughout the United States. Based upon these challenges, there is a need for an orderly judicial administration of pending and related litigation.

The State, accordingly, has a vital interest in seeking review of the lower Court's decision, which, if left undisturbed, would jeopardize the State's revenue and disrupt a pervasive system of regulation which has served the public for over 45 years.

STATEMENT OF THE CASE

Among the petitioners before the lower Court are licensed importers and wholesalers of the State of California, who desire to secure national brands of distilled spirits from Oklahoma wholesalers. In this proceeding, the lower Court invalidated that portion of the California Business and Professions Code, Sections 23672 (as amended by Assem. Bill No. 499, Stats. 1979, Ch. 280, Sec. 1; hereinafter "designation statute"), which provides that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits, unless designated as an authorized importer of such brand by the brand owner or its authorized representative.

The respondent, Baxter Rice, Director, Department of Alcoholic Beverage Control, believes the State interest will be best served by requiring a licensed California importer to be designated as an authorized importer of such brand by the brand owner or its authorized agent.

To the extent that the petitioners were not designated as authorized importers of such brand, they elected to challenge the Statute.

The lower Court, in reliance upon this Court's decision, in *California Retail Liquor Dealers Assn* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), invalidated the "designation" portion of the Statute on the basis of a Sherman anti-trust pre-emption test, by finding that the federal policeis of the Sherman Act outweigh the State interests related to the Statute.

SUMMARY OF ARGUMENT AND REASONS FOR GRANTING THE WRIT

The decision below raises issues of grave concern. The State's interest as an amicus party in this proceeding is far broader than the specific "designation statute" reviewed by the lower Court. Based on this Court's recent decision in *California Retail Liquor Dealers Assn* v. *Midcal Aluminum, Inc., supra* ("Midcal"), the lower Court has established an anti-trust pre-emption test as a basis for challenging enactments under Section 2 of the Twenty-First Amendment. Considering the universal application of *Midcal* since March, 1980, which was decided by the same lower Court, it is probable that the "*Norman Williams*" anti-trust pre-emption test will be the forerunner for all future challenges to enactments under Section 2 of the Twenty-First Amendment.

In this brief, we show that the lower Court holding is in direct conflict with this Court's' decision in ***"Midcal"***, its earlier decisions related to the Twenty-First Amendment, and a recent Kansas Supreme Court decision in *Colby Distributing Co.* v. *Lennen,* 227 Kan. 179, 606 P. 2nd, 102 (1980), which on appeal was summarily dismissed by this Court in *Grant-Billingsley Liquor Co., Inc.* v. *Michael C. Lennen,* 49 U.S. Lw. 3331 for want of a substantial federal question (November 3, 1980). If the lower Court's decision is left undisturbed, it would have an unsettling effect on numerous other state statutes and regulations, thereby seriously jeopardizing the state's revenue and power to regulate the alcoholic beverage industry. Anti-trust laws control the conduct of private parties. They are an inappropriate means for testing enactments under the Twenty-First Amendment, which regulate an industry.

ARGUMENT

I. HISTORICAL BACKGROUND OF THE TWENTY-FIRST AMENDMENT

Tempered by the experience of pre-prohibition, as well as the prohibition era (prior to 1933), both Congress and the Courts have memorialized that alcoholic beverage products and the alcoholic beverage industry are distinctively different than other products and industries which are a part of the American economic system. Persons engaged in the alcoholic beverage industry are not private entrepreneurs such as exit in other industries. The inherent dangers related to alcoholic beverages and the unique nature of the liquor industry have justified a regulatory system dissimilar to the other industries, i.e., state operated liquor stores; limitations on retail purchases across state lines; restrictions on product line; restrictions on credit to consumers; restrictions on: advertising, labeling, packaging, bottle sizes, production etc. This industry is engaged in a quasi-partnership with the State and annually produces millions of dollars of State revenue. Enforcement is monitored by hundreds of state inspectors.

It is the only industry which was legalized by Constitutional Amendment, and represents the only express grant of power to the states, thereby creating a fundamental restructuring of the Constitutional scheme as it relates to one product . . . intoxicating liquors. *California* v. *LaRue*, 409 U.S. 109 (1972).

The comprehensive regulatory scheme, which has been adopted under the Twenty-First Amendment by each

state, is designed to protect its revenue as well as control the production and movement of product and persons engaging in business. The control needed to accomplish these goals is a network of regulations which work together.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT UNDER SECTION 2 OF THE TWENTY-FIRST AMENDMENT

A. "MIDCAL"

The issue presented for review is whether or not the constitutionality of statutes adopted under Section 2 of the Twenty-First Amendment should be perpetually tested on the basis of the general purpose of the anti-trust laws. In reliance upon this Court's decision in *Midcal, supra,* the lower Court invalidated a portion of a California Statute which permitted brand owners to designate distributors of its brands, by finding that such grant of authority was in direct contravention of the express purpose of the Commerce Clause and the Sherman Act. The statute involved amends the California Business and Professions Code, Section 23672, and provides in part as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. . . ." ("Designation Statute")

Thus, the Statute under attack in this proceeding, pertains to the power of a state to regulate the importation of liquor and how to structure the distribution system. The lower Court decision is in direct conflict with *Midcal,* which specifically reaffirmed a state's power under the Twenty-First Amendment to regulate the im-

portation and distribution of liquor within its borders, wherein the Court stated on page 946:

> "The Twenty-First Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."

and on page 944:

> "This Court's early decisions on the Twenty-First Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions."

In *Midcal*, this Court invalidated California's wine pricing system on the basis it violated the Sherman Anti-Trust Act. *Midcal* is a price case, and price competition has always been a matter of long-standing active concern to the federal government. A discussion of *Midcal*, its extension or application, should be viewed on the basis that price-fixing is the most firmly established and most "per se" of the "per se" violations.

Therefore, at most, *Midcal* is a limited exception to this Court's earlier decisions related to the Twenty-First Amendment and the federal commerce powers. Yet, even in pricing cases, the Supreme Court has sustained the Twenty-First Amendment against anti-trust challenges. In *Joseph E. Seagram & Sons, Inc.* v. *Donald S. Hostetter*, 384 U.S. 60 (1966), a New York Statute which required that monthly price schedules filed by brand owners with the State Liquor Authority must be accompanied by an affirmation as to price, was unsuccessfully attacked under the Sherman Act.

It was not the intention of this Court to establish a perpetual Sherman Act test for purposes of challenging

enactments under Section 2 of the Twenty-First Amendment, wherein this Court stated in *Midcal* on page 946:

> "Although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power *in appropriate situations.*" (emphasis added)

Application of the federal commerce power to invalidate California's "Designation Statute" is not an *appropriate situation.* A review of Supreme Court decisions prior to *Midcal* is dispositive of how the federal commerce powers have affected the Twenty-First Amendment.

B. COMMERCE CLAUSE VERSUS TWENTY-FIRST AMENDMENT

The lower Court's holding is in direct conflict with Supreme Court decisions pertaining to the federal commerce power and the Twenty-First Amendment.

Supreme Court decisions since adoption of the Twenty-First Amendment have confirmed that the amendment primarily created an exception to the normal operation of the Commerce Clause. *State Board of Equalization of California* v. *Young's Market Company,* 299 U.S. 59 (1936); *Finch & Co.* v. *McKittrick,* 305 U.S. 395 (1939); *Carter* v. *Virginia,* 321 U.S. 131 139-140 (1944); *Hostetter* v. *Idlewild Liquor Corp.,* 377, U.S. 324 (1964); *Craig* v. *Boren,* 429 U.S. 190, 205, 97 S. Ct. 451, 461, 50 L. Ed. 397 (1976); *U.S.* v. *Frankfort Distilleries,* 324 U.S. 293, 299, 300 (1945).

The State's power under Section 2 of the Twenty-First Amendment compels restrictive economic regulations which restrain trade and have prevailed over Commerce Clause tests in several instances wherein the challenged statute regulated the importation of intoxicating liquors.

In *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938) the Court upheld a law restricting the types of liquor that could be imported from other states. In *Finch & Co.* v. *McKittrick, supra; Indianapolis Brewing Co.* v. *Liquor Control Commissioners,* 305 U.S. 391 (1939), this Court upheld a state's right to legislate in retaliation for another state's enactments which affect commerce within the state's borders, barring imports from states that proscribe shipments of liquor from other states; in *State Board* v. *Young's Market, supra,* the Court upheld a State's right to exact a license fee for the privilege of importing beer from other states; and, further, in *Ziffrin, Inc.* v. *Reeves, Commissioner of Revenue of Kentucky, et al.,* 308 U.S. 132 (1939) the court upheld a statute which restricted the transportation of alcoholic liquors, to certain prescribed carriers while within its borders and destined for interstate commerce, *in order to protect the state's revenue.* In each of these cases, the Supreme Court opted in favor of the *State's interest* and upheld the right of a state to regulate the importation of intoxicating liquor unconfined by the commerce clause or Sherman Act. *Midcal* re-affirmed each of the above decisions. See also *Heublein, Inc.* v. *South Carolina Tax Commission,* 409 U.S. 275 (1972).

The lower Court has disregarded the principles established under the federal commerce power cases and was persuaded more by the conventional purpore of the Sherman Act, as it pertains to the conduct of private parties, rather than its application to the Twenty-First Amendment, wherein the Court stated at page 570:

> "Art. 1. Section 8(3) of the United States Constitution gives to the federal government the exclusive power to regulate interstate commerce."

Also at page 571.:

> "In the balancing process we are required to determine what policies are furthered by the State Statute, whether and to what degree the policy underlying the Sherman Act is undermined by that Statute."

It is clear by the emphasis placed on the Sherman Act by the Court below that it believes in federal supremacy rather than state primacy over the regulation of alcoholic beverages. This principle has been long-established in favor of the states. *U.S.* v. *Frankfort Distilleries, supra,* page 300.

The flaw in the lower Court's reasoning is its failure to acknowledge that the Twenty-First Amendment created an exception to the normal operation of the Commerce Clause, and that the states were free from the implied restrictions of the Commerce Clause. The Sherman Act was adopted pursuant to the Commerce Clause and is not afforded more meaning than the clause itself. Anti-trust laws are designed to eliminate private party abuses and combinations while the Twenty-First Amendment attempts to prevent abuses in the liquor traffic.

Thus, having failed to distinguish between the Commerce Clause and the Twenty-First Amendment, as compared to the Commerce Clause and private party conduct, any subsequent attempt by the lower Court to apply the "so-called" balancing test referred to in *Midcal* was meaningless.

It is not the position of the amicus that private parties engaged in the liquor business are immune from the anti-trust laws. Rather, under the "Designation Statute" the brand owner exercises an independent judgment as to selection of one or more importers for its brands.

It is conceivable that private parties may engage in conduct beyond the scope of the Designation Statute, which could lead to a violation of the anti-trust laws. That issue is not before the Court at this time. *Seagram* v. *Hostetter, supra,* pages 1259-1260.

Perhaps the clearest expression of reservations under the Twenty-First Amendment is set forth in the recent decision of the 5th Circuit, U. S. Court of Appeals in *Castlewood International Corp.* v. *Simon,* 596 Fed. Rptr. 2d 638, cert granted, judgment vacated, remand by the U. S. Supreme Court for further consideration in light of *Midcal* on May 19, 1980, opinion reinstated by 5th Circuit U. S. Court of Appeals, October 1, 1980, wherein the Court stated on page 643:

> "Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and 2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations, regulation of commerce with foreign nations, and taxation of imports from foreign countries."

Therefore, the anti-trust laws are not an appropriate challenge to the constitutionality of the "Designation Statute" and any argument as to their applicability is premature.

C. DESIGNATION STATUTES DO NOT PRESENT A FEDERAL QUESTION

The lower Court decision is in conflict with the decision of the Kansas Supreme Court in *Colby Distributing Co.* v. *Lennen, supra,* wherein the Court rejected a Sherman Act challenge to a Kansas Statute enacted under the Twenty-First Amendment, which is similar to the

California Statute. Both the Kansas and California Statutes authorize brand owners to designate distributors. However, the Kansas Statute is more restrictive in that it provides for exclusive distributors territorial allocations for distribution and proof of good cause for purposes of terminating a distributor.

The Sherman Act challenge in *Colby* was pursued on appeal before this Court whereby an order of summary dismissal was entered for want of a substantial federal question on November 3, 1980. See *Grant-Billingsley Wholesale Liquor Co., Inc.* v. *Lennen, supra.* Dismissals for want of a substantial federal question are decisions on the merits and have precedential value. *Hicks* v. *Miranda,* 422 U.S. 322 (1975). The lower Court decision is in conflict with this Court's order of dismissal in *Grant-Billingsley.*

III. THE DECISION BELOW WILL HAVE AN UNSETTLING EFFECT ON NUMEROUS STATE STATUTES AND REGULATIONS, AND WILL JEOPARDIZE THE STATES' FURTHER ABILITY TO CONTROL THE IMPORTATION, DISTRIBUTION, SALE, CONSUMPTION AND TAXATION OF ALCOHOLIC BEVERAGES

The lower Court decision is contrary to this Court's holding in *Midcal* and its earlier decisions under the federal commerce power. It is the position of the amicus that the finding of the lower Court transcends the "Designation Statute" and jeopardizes the comprehensive regulatory system governing the alcoholic beverage industry during the past 45 years. The lower Court relied upon *Midcal,* which is the most important decision applicable to the beverage alcohol industry over the past 20 years. Originally, *Midcal* was decided by the same California Court of Appeal which decided *Williams,*

wherein the Court of Appeal relied entirely upon the reasoning in *Rice* v. *Alcoholic Beverage Appeals Board*, 21 Cal. 3d 431 (1978).[1]

We, therefore, have a series of California decisions, one which led to *Midcal*, and in the instant matter, one which is interpreting *Midcal*. The impact of the California decisions is already evident in cases now pending in other jurisdictions throughout the country.[2] So, too, the lower Court decision will have perpetual and universal application to present and future challenges under the Twenty-First Amendment.

The lower Court failed to qualify the express purpose of the anti-trust laws (free and unfettered competition) by decisions of this Court, which have held that the Twenty-First Amendment primarily created an exception to the normal operation of the commerce clause.

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[1] Also, in *Capiscean Corp.* v. *Alcoholic Beverage Controls Board*, 87 Cal. App. 3d, 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[2] *H. & H. Distributing Co.* v. *Mississippi Tax Commission, et al.* in the U.S. District Court, Southern District of Mississippi, Jackson Division; Case No. J 80-0323 (N); *Mile-Hi Wholesale Liquors, Inc.* v. *Alan Charnes, Executive Director of the Department of Revenue of the State of Colorado*, in and for the City and County of Denver, State of Colorado; *Walgreen Company, et al.* v. *Illinois Liquor Control Commission, et al.*' in the Circuit Court of the Twelfth Judicial Circuit, Kankakee County, Illinois, No. 8-MR-76; *M.H. Gordon and Son, Inc.* v. *Alcoholic Beverage Control Commission, Commonwealth of Massachusetts*, Superior Court, Case No. 79-704. *Fisher Foods, Inc.* v. *The Ohio Department of Liquor Control*, U.S. Dist. Ct., Third District of Ohio, C80-2381, filed 12-29-80.

Thus, it is the finding of the lower Court which seriously jeopardizes a pervasive system of regulation that has evolved over the years, wherein the lower Court stated:

> "We find that the *substantial federal policies of the Sherman Act* are violated by the Liquor Designation Statute and, in light of the clear alternatives to that Statute, the state interests sought to be achieved are not sufficient to outweigh these policies." (emphasis added)

It is obvious from the Court's finding, that by not recognizing the declared restraints to the normal operation of the commerce clause, it was precluded from making a meaningful evaluation of the State's interest. The Sherman Act was enacted under the authority of the Commerce Clause and is necessarily of no greater dignity than that clause. The evils at which it is aimed differ from the abuses attempted to be corrected by the state law here in question. The one seeks to stamp out private monopoly and to interdict combinations in restraint of trade, the others to correct abuses inherent in the liquor traffic. Thus, the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor control legislation, for invocation of that Act tends to hamper or interfere with the enforcement of state laws, regulatory of the transportation or importation of intoxicants, and wherever such confict exists, the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances. See *Washington Brewers Institute* v. *United States*, 137 Fed. Rptr. 2d 964, p. 967 and 968, 9th Circ., Court of Appeals (1943); *U. S.* v. *Frankfort Distilleries, supra,* P. 299, 300.

As the amicus has pointed out in this brief, the state's power under Section 2 of the Twenty-First Amendment is intended to restrict trade and commerce as it relates to one product, intoxicating liquors.

> "Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme." *Castlewood International Corp.* v. *William Simon, supra.* P. 642.

Further, the state policy related to the "Designation Statute" is a valid interest. Pursuant to both the federal and California regulations, restrictions are imposed on brand owners as to: importing, advertising, packaging, labeling, bottle sizes, exchange and return of product. Revenue is produced by way of license fees, occupation taxes and excise taxes. In the area of importation and taxation, brand owners are required to obtain licenses, file reports, and comply with standards of production, all of which are intended to protect the State's revenue, as well as the health and welfare of its citizens. It is in the State's interest that persons authorized by a brand owner are importing brands into the State as opposed to a system, which encourages importation of alcoholic beverages *from any source* outside the state. There is nothing unique about the designation system, as it has existed throughout the alcoholic beverage industry, as well as other industries.

The "designation statute" is one component of a series of regulations which together permit the importation of

liquor and structuring of the distribution system. *Supervision* under the designation statute, as well as other statutes, is implemented by a broad grant of regulatory authority to the Department and Board, Article XX, Section 22 of the California Constitution, Section 25750 of the Business and Professions Code of California.

Therefore, taking into account the enormous responsibility which has been delegated to the States under the Twenty-First Amendment, it is not the function of a court to speculate as to the propriety of state policy. The legislature is the policy-maker of the State. Their discretion is broad and may not be overturned because a court may deem them unwise.

In *Joseph A. Seagram & Sons, Inc.* v. *Donald S. Hostetter, supra,* this Court stated on page 1262.:

> "We have returned to the original constitutional proposition that courts do not substitute their social *ecenomic beliefs* for the judgment of legislative bodies who are elected to pass laws." (emphasis added)

and in *U. S.* v. *Franfort Distilleries, supra,* Justice Frankfurter, in his concurring opinion, stated on page 300.:

> "The course of legal history which made necessary the Twenty-First Amendment in order to permit the States to control the liquor traffic, *according to their notions of policy* freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in *Carter* v. *Virginia,* 321 U.S. 131, 139." (emphasis added)

It is the province of the legislature guided by the experience of a state agency, which can best determine the tools needed to regulate an industry. The lower Court

was in no position to judge the precise manner in which the "Designation Statute" would fit into the State's network of regulations, nor could it determine that the Statute will result in a restraint subject to the Sherman Act. Application of the Sherman Act was premature and inappropriate in this proceeding.

CONCLUSION

The pre-emption test adopted by the Court has been structured as a standard by which to test the validity of all enactments under Section 2 of the Twenty-First Amendment. Under the terms of the amendment, the control is restrictive. Thus, regulations under Section 2 will not pass muster if subjected to a conventional anti-trust test, as applies to ordinary articles of commerce.

This prospect would endanger a network of regulations that combine and work together; it will de-control a structure which is designed to protect the yield of millions of dollars in state revenue; it will cause confusion as to whether federal or state government is responsible for enforcement activities; it will de-stabilize 45 years of effective pervasive regulation and cause chaos in the meantime. In the instance of alcoholic beverages, that is not responsive to protection to the health, safety and welfare of the public.

In reliance on this Court's pre-*Midcal* decisions over the past four decades, the States have conscientiously exercised its best judgment in controlling the traffic in alcoholic beverages. *Midcal*, at best, is a singular exception as it applies to direct pricing arrangements. The lower Court decision is a gross distortion of a limited

exception. Alternatively, the lower Court has misinterpreted the application of *Midcal*, which confusion is now *national* in scope as evidenced by the cross-section of states that have joined in as amicus parties in this proceeding.

It is, therefore, essential that this Court end the confusion, grant this writ, and determine whether or not the anti-trust laws may be used perpetually as a basis to test the validity of all enactments under the Twenty-First Amendment.

For all of the foregoing reasons, this Court should grant certiorari, and reverse the judgment of the lower Court.

Respectfully submitted,

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JAN 13 1981

No. 80-1012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioner,

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Respondents.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

United States Brewers Association (USBA) moves pursuant to Rule 36 of the Rules of this Court for leave to file the annexed brief *amicus curiae* in support of the petition for writ of certiorari. Consent to the filing of this brief has been obtained from counsel for petitioners. A copy has been lodged with the clerk of the Court. Respondents have denied their consent.

USBA is a trade association representing 33 brewers of malt beverages, ten affiliated members who either brew or import foreign malt beverages, and over 100 associate members engaged in related businesses. They collectively conduct business in all 50 states, the District of Columbia and Puerto Rico. USBA's member brewers are responsible for approximately 75 percent of all beer sales in the United States.

USBA is organized under the laws of New York. Its principal purposes are to contribute to the growth, prosperity

and welfare of the brewing industry; to collect, prepare and disseminate information relating to the industry or of interest to its members; to oppose unfair or improper practices inimical to the industry; and to cooperate with government agencies to secure observance of applicable legal requirements. USBA's Board of Directors has authorized the filing of a brief *amicus curiae* in support of the petition for writ of certiorari in this case.

This case has special significance to USBA. Statutes similar to that invalidated here, known as "designation" or "primary source" laws, are now in effect in at least fifteen other states and the District of Columbia. Malt beverages brewed or sold by USBA's members are subject to many of these laws. The decision in this case places the validity of these other designation and primary source laws in substantial doubt, and USBA and its members have a direct interest in the prompt resolution of those doubts. Further, the state court's decision raises important questions regarding the proper application to state liquor controls of the federal antitrust laws, in accordance with this Court's recent decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). USBA's members are subject to numerous state liquor control laws that may, unless further guidance is provided by this Court, be challenged under the federal antitrust laws. Delay, uncertainty and inconsistency are likely to result from such challenges.

USBA's interests in this case differ only slightly from those of the existing parties. The California statute involved here is applicable only to distilled spirits, and the interests of the existing parties relate principally to the statute's implications for the importation and sale of such spirits within California. The Court's disposition of this petition will, however, seriously affect the validity of numerous similar statutes outside California, many of which are applicable to malt beverages. Without the participation of USBA as *amicus curiae*, the Court will not have before it the views of persons interested in the distribution and sale of malt beverages in those other states whose statutes will be affected by the Court's action.

For these reasons, United States Brewers Association requests that this motion to file the annexed brief *amicus curiae* be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1012

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE UNITED STATES BREWERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

The interest of *amicus* is set forth in the preceding motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

In its decision in this case, the California Court of Appeal held, without trial or even an evidentiary hearing, that Section

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[1] Although this brief *amicus curiae* is addressed specifically to the petition in No. 80-1012, filed on behalf of the Director of California's Department of Alcoholic Beverage Control, companion petitions seeking review of the same California decision also have been filed with the Court in Bohemian Distributing Co. v. Norman Williams Co., No. 80-1030, and Wine & Spirits Wholesalers of Calif. v. Norman Williams Co., No. 80-1052. In USBA's view, all three petitions should be granted and consolidated for argument.

23672 of the California Business and Professions Code, as amended by Assembly Bill No. 499,[2] is invalid by reason of its asserted inconsistency with the federal antitrust laws. The reasons for review by this Court are several and important. The state court's decision ignores long-established federal and constitutional policies, conflicts with recent decisions of this Court, misconstrues the requirements of the federal antitrust laws, and wrongly casts doubt on the validity of similar statutes adopted by at least fifteen other states and the District of Columbia.[3] Review by this Court is imperative to restore important constitutional principles, resolve the conflicts and clarify the extent of state authority regarding significant issues of public policy.

I.

The state court's decision ignores longstanding federal and constitutional policies.

It has been settled almost since the nation's beginning that the states have broad authority to regulate the importation and distribution of alcoholic beverages within their borders. At least as early as *Peirce v. New Hampshire,* 46 U.S. (5 How.) 554 (1847), this Court recognized the states' wide discretion regarding the distribution of such products. The powers of the states were later confirmed and even extended by the Wilson Act, ch. 728, 26 Stat. 313 (1890),[4] the Webb-Kenyon Act, ch.

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[2] Stat. 1979, ch. 280, § 1. In pertinent part, the statute provides as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

[3] Minor variations in the terms of the different statutes make any precise count difficult, but such statutes exist in at least 16 jurisdictions other than California. *See* petition in No. 80-1012, at 28-29. *Compare* petition in No. 80-1052, at 5 and Appendix E.

[4] The Wilson Act, now found at 27 U.S.C. § 121, restored state authority over the sale of liquor in its original package, as that authority had been understood to exist prior to Leisy v. Hardin, 135 U.S. 100 (1890).

90, 37 Stat. 699 (1913),[5] and the Collier Act, ch. 740, § 202(b), 49 Stat. 877 (1935).[6] In each of these successive statutes, Congress acknowledged and protected the state's authority. In each of them, Congress relinquished portions of its own constitutional powers of regulation under the Commerce Clause. *Dugan v. Bridges,* 16 F. Supp. 694, 703-04 (D. N.H. 1936) (three-judge court), *appeal dismissed,* 300 U.S. 684 (1937). Finally, any possible uncertainty as to the breadth of the states' authority in this area was removed by the adoption in 1933 of the Twenty-first Amendment to the Constitution. *See Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966).

In a lengthy series of cases, this Court has construed first the federal statutes and later the Twenty-first Amendment to give the states broad authority to structure and control the local distribution of alcoholic beverages within their borders. *E.g., State Board of Equalization v. Young's Market Co.,* 299 U.S. 59 (1936); *Mahoney v. Triner Corp.,* 304 U.S. 401 (1938). It has long been settled that, "unfettered by the Commerce Clause," a state may absolutely prohibit the manufacture, transportation, sale and even possession of intoxicants. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939). Correspondingly, a state may elect to permit the local distribution of alcoholic beverages only under stringent conditions prescribed by the state within its "large discretion." *Id.* at 138-39.[7]

These long-established principles have recently been confirmed by this Court. In *California Retail Liquor Dealers Ass'n*

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[5] The Webb-Kenyon Act, now found at 27 U.S.C. § 122, prohibits the shipment or transportation of liquor into any state, territory or district in violation of the laws of that jurisdiction.

[6] The Collier Act reenacted without change the Webb-Kenyon Act.

[7] *See also, e.g.,* Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Finch & Co. v. McKittrick, 305 U.S. 395 (1939). In *Finch,* Justice Brandeis observed that, since the Twenty-first Amendment, "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Id.* at 398.

v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), decided only last Term, the Court described the standards by which state liquor controls, the Twenty-first Amendment and the federal antitrust laws are to be accommodated. Although it there invalidated a state statute,[8] the Court left no doubt of the broad authority afforded the states.[9] Even more recently, the Court dismissed for want of a substantial federal question an appeal from a decision of the Kansas Supreme Court sustaining a state statute very similar to that invalidated in this case. *Colby Distrib. Co., Inc. v. Lennen,* 227 Kan. 179, 606 P.2d 102, *appeal dismissed sub nom. Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen,* 49 U.S.L.W. 3331 (Nov. 3, 1980).[10]

The state court's decision ignored or misunderstood these well-settled principles. Despite the states' "large discretion" regarding the importation and distribution of alcoholic beverages, it invalidated Assembly Bill No. 499 with only a cursory examination of the state's interests and powers. Despite this Court's decisions in *Midcal* and *Colby,* it misapplied the federal antitrust laws and misunderstood the limits of state authority. Unless review is granted by this Court, an important area of public policy, involving similar statutes adopted by numerous other states and the District of Columbia, will be left confused and uncertain.

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[8] It is significant, however, that state authorities made little effort to support the statute in *Midcal. Id.* at 111 n.12. In contrast, state authorities here have vigorously defended Assembly Bill No. 499 and now seek review by this Court of the state court's decision. *See* petition in No. 80-1012, at 49-50.

[9] For example, the Court carefully emphasized that:

> "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110.

[10] Indeed, the Kansas statute sustained in *Colby* goes even further than Assembly Bill No. 499, in that it prohibits a supplier from designating more than one wholesaler for a particular brand in a particular local geographical area, which may include the entire state. If, as this Court found, no substantial federal question is presented by the Kansas statute, *a fortiori* no federal impediment exists to the enforcement of Assembly Bill No. 499.

II.

The decision in this case ignored important state interests served by Assembly Bill No. 499.

Without pausing to conduct any factual inquiry, the California court concluded, after an examination merely of briefs and pleadings, that Assembly Bill No. 499 will not "clearly" vindicate any significant state interests.[11] By so doing, the court disregarded rudimentary principles for determining the validity of state legislation under the Constitution. Fifty years ago, in an opinion by Justice Brandeis, this Court emphasized that state legislation is entitled to a "presumption of constitutionality" that must prevail "in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931). Under the presumption, no burden lies upon the state to establish the purposes for which the statute was intended. To the contrary, state legislation may be invalidated only if a factual showing is first made that "evils do not exist" for which the statute might be "an appropriate remedy." *Id.* at 258. The failure of the California court to give deference to the presumption of constitutionality, and its unsupported conjecture that the statute cannot "clearly" serve any state interest, alone warrant review by this Court.[12]

In any event, the important state interests served by Assembly Bill No. 499 are readily discernible even from the

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[11] Appendix to the petition in No. 80-1012, at 30.

[12] The presumption of constitutionality described in *O'Gorman* has been frequently applied and reiterated by this Court in more recent cases. *See, e.g.*, Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Fed. Lab. Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963); New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (per curiam). *See also* Hamilton, *The Jurist's Art*, 31 Colum. L. Rev. 1073 (1931); L. Tribe, *American Constitutional Law*, § 16-3 (1978).

court of appeal's fragmentary analysis. The court itself recognized that without the statute wholesalers in California would be free to obtain distilled spirits through an "Oklahoma connection."[13] It is apparent that the statute is intended, among other purposes, to permit more effective monitoring of distilled spirits imported into the state, prevent circumvention of the state's other control provisions, and assist in the collection of revenues. Whether Assembly Bill No. 499 is the best or only method for achieving these goals is immaterial. It matters only that California and other states have "large discretion" to structure the distribution of alcoholic beverages within their borders as they deem appropriate. No court, whether federal or state, has authority under the Constitution to serve as a "super-legislature to weigh the wisdom" of a state's legislative exercise of such discretion. *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423 (1952); *Ferguson v. Skrupa,* 372 U.S. 726, 731 (1963).

III.

No conflict exists between Assembly Bill No. 499 and the federal antitrust laws.

The state court's decision assumed that Assembly Bill No. 499 permits private conduct that restrains trade and undermines federal policies embodied in the Sherman Act.[14] Every detail of the court's analysis is mistaken. Contrary to the decisions of this Court, the California court seriously misunderstood the federal antitrust laws and wrongly presumed the

[13] Appendix to the petition in No. 80-1012, at 6. As stated by the petitioners in No. 80-1052, at page 7, it would be feasible for the "Oklahoma connection", that is the Oklahoma wholesaler, to order distilled spirits from an Illinois distiller with instructions to route the product directly for delivery into California. California's authority to protect against such illusory "paper transactions" is surely indisputable.

[14] Appendix to the petition in No. 80-1012, at 12-21.

existence of a novel and unjustified category of *per se* violations of the Sherman Act. Review is required here to clarify the application of the antitrust laws to an important area of public policy.

It is significant that Assembly Bill No. 499 does not alter or extend the existing right of brand owners to select the wholesalers with whom they elect to deal. For more than 60 years it has been understood that brand owners enjoy the right unilaterally to choose their wholesalers. *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76, 78 (9th Cir. 1969), *cert. denied*, 396 U.S 1062 (1970). Under the California statute, brand owners remain free to deal with as many or as few of the state's licensed wholesalers as they individually elect, based upon their own separate marketing policies. The statute does not, however, authorize horizontal agreements among brand owners regarding the number or identity of their wholesalers, or any other question. With respect to all such matters, no conflict exists between Assembly Bill No. 499 and the requirements of the federal antitrust laws.[15]

Nor is any conflict necessarily created because the California statute prevents those wholesalers who have not been designated as authorized importers from purchasing distilled spirits through an "Oklahoma connection." In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court held that vertical restraints imposed upon distributors by manufacturers do not *per se* violate the Sherman Act, but instead must be evaluated through the rule of reason, based upon a detailed factual assessment of the justifications for and economic consequences of the restraints. In this case, however, the California court did not pause to undertake any such factual analysis. Instead, misconstruing *GTE Sylvania*, the court simply presum-

[15] It is doubtless true that Assembly Bill No. 499, or any other legislative enactment, might at some future moment be susceptible of abuse. It is well-settled, however, that the mere future possibility of abuse cannot justify the invalidation of state legislation. *E.g.*, Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45-46 (1966).

ed that Assembly Bill No. 499 authorizes on its face *per se* violations of the antitrust laws.

This Court has repeatedly warned against hasty and superficial analyses of the difficult issues of federalism presented here. In *Midcal,* the Court emphasized that "no bright line" divides state and federal powers in this area, and held those powers may be accommodated only through a "careful scrutiny" performed within the discipline of a "concrete case." 445 U.S. at 110. In other decisions, the Court has cautioned that state legislation is not invalid merely because it may be thought to involve anticompetitive consequences or to permit private conduct that might violate the antitrust laws.[16] In all these cases, the Court has made clear that the application of the antitrust laws to state legislation cannot be determined abstractly or without detailed examination of an appropriate factual record. The California court's effort to dispose of this case without such a record, on the basis merely of its misunderstanding of *GTE Sylvania,* has introduced disorder and uncertainty into an important area of public policy.

IV.

Assembly Bill No. 499 constitutes state action exempt from the federal antitrust laws.

The California court's misapplication of the antitrust laws was compounded by its failure to follow the state action doctrine established in *Parker* v. *Brown,* 317 U.S. 341 (1943), *Midcal* and other cases. Without troubling to examine the comprehensive regulatory system of which Assembly Bill No. 499 forms only a small part, the court of appeal assumed that state authorities could not be sufficiently involved in the statute's administration to constitute state action. No basis exists for the court's conjecture.

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[16] *See, e.g.,* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. at 45-46; Exxon Corp. v. Maryland, 347 U.S. 117, 133 (1978).

First, it is important that Assembly Bill No. 499 was never permitted even to go into effect. Until state authorities have been permitted reasonable opportunities to implement the statute, it can hardly be presumed that they will not be sufficiently involved in its administration to satisfy the state action doctrine. Second, the court ignored other provisions of California law under which state authorities have broad powers to supervise the application of Assembly Bill No. 499. Both the California Constitution, article XX, section 22, and Section 25750 of the California Business and Professions Code give petitioner and the Department of Alcoholic Beverage Control wide-ranging authority to promulgate regulations regarding the importation and control of alcoholic beverages. Indeed, supervisory regulations already exist that require out-of-state shippers of distilled spirits both to obtain appropriate certifications and to identify the wholesalers whom they have designated as authorized importers.[17] No reference was made by the court of appeal to any of these regulatory provisions.

The California court's cursory examination of the state action issue illustrates vividly the importance of review by this Court. Relying exclusively upon purported requirements of federal law, the court of appeal invalidated California's reasonable exercise of the "large discretion" afforded every state regarding the importation and distribution of alcoholic beverages. By so doing, the court introduced uncertainty and confusion into an area of substantial state concern, ignored long-settled constitutional principles, and invited needless litigation regarding similar statutes adopted by other states and the District of Columbia.[18] Guidance from this Court is urgently needed to resolve the uncertainty and prevent the unnecessary burdens of additional litigation.

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[17] These regulatory provisions are reprinted in Appendix F to the petition in No. 80-1052.

[18] Ironically, the District of Columbia provisions were adopted pursuant to authority granted by Congress. *See* District of Columbia Alcoholic Beverage Control Act, 48 Stat. 319 (1934), codified at D.C. Code §§ 25-101 *et seq.*

CONCLUSION

For the reasons above stated, the petition for writ of certiorari, together with the companion petitions in Nos. 80-1030 and 80-1052 should be granted.

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Nos. 80-1012
80-1030
80-1052

IN THE

Supreme Court of the United States

October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California, *et al.*,
Petitioners,

v.

NORMAN WILLIAMS COMPANY, *et al.*,
Respondents.

On Petitions For Writ of Certiorari To The Court of Appeal of the State of California, Third Appellate District

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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Nos. 80-1012
80-1030
80-1052

IN THE

Supreme Court of the United States

October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California, *et al.*,

Petitioners,

v.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

On Petitions For Writ of Certiorari To The Court of Appeal of the State of California, Third Appellate District

MOTION BY WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND NATIONAL BEER WHOLESALERS ASSOCIATION OF AMERICA, INC. TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

The Wine and Spirits Wholesalers of America, Inc. ("WSWA") and National Beer Wholesalers Association of America, Inc. ("NBWA"), pursuant to Rule 36 of this Court, move for leave to file the annexed brief *amici curiae* in support of the petitions for a writ of certiorari. Written consent of counsel for the petitioners has been obtained.

Counsel for respondents have refused their consent to any *amicus* briefs "prior to acceptance of [this] case by the Supreme Court." Copies of those consents and refusals are herewith filed with the Clerk of the Court.

WSWA and NBWA, both not-for-profit corporations, are the major national trade associations for wholesale distributors of distilled spirits, wines and malt beverages. These wholesalers conduct their businesses in the "open" or "license" states, which permit the private enterprise distribution of alcoholic beverages (as distinguished from the minority of "monopoly" or "closed" states in which the state itself operates the business of wholesaling one or more types of alcoholic beverage). WSWA has more than 800 members in 41 states, and NBWA has more than 1800 members in 50 states.

Distribution of alcoholic beverages in the open states is conducted pursuant to wholesale licenses. In keeping with the traditionally accepted need for governmental regulation of beverage alcohol, all levels of the trade in these products are subject to highly detailed but purposefully integrated regulatory complexes which, reflecting the individual policies of the particular state, differ significantly from state to state and beverage to beverage.

The decision below (*Norman Williams Co.* v. *Rice,* 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980)), which has attracted widespread attention in view of its radical departure from controlling precedent and threat to effective competition and existing governmental regulation in many states other than just California, is of the utmost importance and concern to the members of WSWA and NBWA.

If not repudiated, the erroneous legal principles adopted by the court below in striking down California's wholesaler designation or primary source statute threaten the similar statutes of the many other states where the members of WSWA and NBWA do business. The *Williams* decision also invites challenge of myriad other regulatory provisions on the same mistaken analysis of federal anti-

trust law and objectives and, at the very least, creates debilitating uncertainty as to whether state agencies should enforce or licensees should comply with those governmental regulations.

If accepted as a viable precedent, *Williams* presages the destruction by the courts, without the benefit of the rule-of-reason analysis mandated by this Court in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), of the franchised distributor system prevailing in the alcoholic beverage industries. As in other industries, this pattern of distribution exists because it achieves the most effective interbrand competition by holding designated wholesalers responsible for providing the local market services necessary to promote the maximum sales of each brand entrusted to them. Elimination of franchised distributorships would result in a substantial reduction of the number of brands available to consumers, the number of retailers serving them, and the number of wholesalers competing for their trade.

In wholly misconstruing this Court's recent opinion in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 455 U.S. 97 (1980), the decision below constitutes a spurious, but nonetheless dangerous, precedent as to the supposed repugnancy of state alcoholic beverage regulations to the federal antitrust laws. It also disregards the long-standing construction of the extent of the power granted to the states by the Twenty-first Amendment to control the importation and structuring of the distribution of those products within their borders.

The fundamental changes in the structure, competitive tenor and governmental regulation of the alcoholic beverage industries in this country threatened by *Williams* make this case one of broad impact and extraordinary import not only to the WSWA and NBWA members and other participants in those industries but to the states and their regulatory agencies, as well. WSWA and NBWA, therefore, respectfully request leave to file the annexed

brief to present matters germane to this Court's exercise of its discretion but not treated or not developed fully in the petitions because of the differing, although wholly compatable, positions of the respective petitioners.

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Nos. 80-1012
80-1030
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IN THE

Supreme Court of the United States

October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California, *et al.*,
Petitioners,

v.

NORMAN WILLIAMS COMPANY, *et al.*,
Respondents.

BRIEF OF *AMICI CURIAE* WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND NATIONAL BEER WHOLESALERS ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

As *amici curiae,* Wine and Spirits Wholesalers of America, Inc. ("WSWA") and National Beer Wholesalers Association of America, Inc. ("NBWA") respectfully urge that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Third Appellate District, which, solely upon grounds of asserted federal repugnancy and upon the face of the statute, enjoined enforcement of the "designated wholesaler" or "primary source" requirement for the importation of distilled spirits enacted by the legislature of that state as §23672 of the California Business and Professions Code. *Norman Williams Co.* v. *Rice,* 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980)[1]

1. The opinion of the state court appears as Appendix A to the Petition for Certiorari filed with this Court by Wine & Spirits Wholesalers of California, an intervenor below. Citations to that opinion in this brief will be by reference to the page number of that Appendix A (*e.g.*, "A5").

Statement

Since 1973, §23672 or its predecessor has prohibited any California wholesaler from importing into California any brand of spirits unless designated as an authorized importer by the brand owner. These provisions were enacted by the legislature to facilitate administration of the state's overall regulatory scheme by stopping the purchase of liquor from Oklahoma wholesalers by parties licensed in California but not designated by the supplier or primary source of the brand. This "Oklahoma connection" springs from the peculiar provisions of the Oklahoma liquor laws. They provide that any brand sold to an Oklahoma distributor must be sold, without limitations on quantity, to all other Oklahoma wholesalers choosing to buy it. The Oklahoma laws also provide that Oklahoma wholesalers may sell to "qualified persons" outside Oklahoma. (37 Okla. Stats. §§521(e), 533)

The California licensees who challenged §23672 purchased from Oklahoma wholesalers only certain leading, fast-moving, nationally advertised brands in just the most popular container sizes. Enjoying a cost advantage from dealing with accounts taking large-volume deliveries and avoiding the higher expense incurred by the designated wholesalers responsible for serving all types of retailers, no matter how distant, small or costly to serve, the non-designated wholesalers profited from the "Oklahoma connection" by "cream-skimming" the lucrative segment of the retail trade. Deprived of that business by prices they could not match, the designated wholesalers' average unit costs were increased both by the reduction in their former volume of business and the higher costs of serving the remaining marginal or less profitable accounts.

A majority of the license states have primary source statutes which, like §23672 in California, require that one or more types of alcoholic beverages, whether distilled

spirits, wine, or others, come directly from the brand-owning supplier (*e.g.*, distiller, rectifier, vintner, brewer, prime importer or other "supplier"). These suppliers are required to hold licenses or permits and are subject to state regulation and control as a condition to the states' allowing the importation of or sale within their borders of the suppliers' brands.

The primary source statutes advance the legitimate legislative purposes not only of facilitating state control of alcoholic beverages at all three tiers[2] of the trade but also of orderly, efficient and competitive marketing to provide ready availability of many competing brands at all types of retail outlets, small and large, in sufficiently numerous locations to insure convenient access to consumers and to encourage both price competition and the furnishing of a broad variety of pro-competitive, volume-building wholesaler services. The statutes achieve these objectives by permitting selective franchising by suppliers of only certain wholesalers (whether one or several in a given marketing area), who are then obligated to invest their time, effort and money in serving all retail accounts and furnishing the services necessary to promote sales of a particular supplier's brand in vigorous competition with those of other suppliers, enhancing brand recognition and consumer demand for and satisfaction with that brand.

Using distilled spirits as an example, that industry, because of the importance of brand recognition in the minds of consumers, deems it essential that brands be available in every outlet where they can be placed, that desirable shelf or display space be obtained at retail estab-

2. The regulatory structures controlling the importation of alcoholic beverages into the states mandate a "three tier" system comprised of separate entities at each of the supplier or producer, wholesaler and retailer levels. Suppliers can sell only to licensed wholesalers and not to retailers. The suppliers, therefore, must look to the wholesalers for the myriad services essential to maximizing the sales volume of their brands in competition with the many brands of competing suppliers.

lishments everywhere possible, that the wholesalers educate the retailers as to the merits of the brands they carry and persuade them to recommend them to consumers, that full stocks in all sizes be continually and readily available for prompt delivery to retailers wherever located and however small, and that wholesalers provide a variety of other services, all of which are designed to build the brand and increase consumer call for it. The provision of these services is necessary to realize the enhanced sales volume which results from the wholesalers' engaging in total account coverage. Thus, in addition to wholesaler promotional services, placing a brand in every possible outlet is necessary to attain the broad availability and visibility which both satisfy and augument demand by creating a consumer image of the popularity and quality of the product. Even the few brands most heavily advertised by the suppliers cannot achieve their potential without such wholesaler promotional support, which is necessary at the local market level to win retailer and consumer acceptance of the brand and thrust for its advancement.

In consequence of the ability which the primary source requirements afford a supplier to designate selectively and hold franchised wholesalers responsible for securing the broadest possible account coverage in order to achieve maximum volume and enhance consumer awareness and demand for the brand, such a wholesaler must be willing and able to serve the large number of small, distant and marginal accounts, including the lower-volume on-premise consumption outlets such as restaurants, clubs and bars, which are costly to serve[3]; he cannot "cherry-pick" and

3. Many retail accounts are at best marginally profitable because of the higher costs of serving them. In addition, the average unit costs of distributing a brand can be lowered when duplication of services, inventory and other expenses is avoided or minimized by the economies of scale which result from placing a brand with one or several but not all wholesalers. These economic factors support the selective distributional patterns which primary source statutes permit as the lowest cost, most efficient means not only to introduce new brands but to keep existing brands in fully effective, vigorous competition with those of other suppliers.

concentrate solely on the large retail stores, which offer greater profit potential but which, alone, are unable to provide the total volume and brand-building consumer awareness which flow from marketwide availability and visibility when the brand is placed and featured in every possible outlet.

As this Court has recognized (see, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977)), selective designation of wholesalers and the imposition of vertical restrictions upon where and to whom they can resell (restrictions not required by the primary source laws in California and most other states), can maximize sales for a supplier by achieving efficiencies and stimulating the furnishing of competitive services by wholesalers committed to building volume for his particular brand. Such distributional restrictions limit or prevent other "free riding" wholesalers—those who elect not to undertake and bear the cost of promotional, volume-building efforts but choose instead to concentrate upon the large-volume, most profitable accounts—from reaping the benefits of such interbrand competitive activities and destroying the capacity of others to provide such services. "Free riding", by reducing the volume designated wholesalers sell and their gross profits, prevents them from providing such competitive services because the costs incurred cannot be recovered.

To the extent that the primary source statutes protect them from the "free rider" problem, the franchised wholesalers in the alcoholic beverage industries have been stimulated and enabled to undertake the commitment and cost of furnishing their panoply of volume-building services not only for leading brands but also for newly introduced, less successful or even struggling brands. If the *Williams* decision stands, however, these salutary interbrand competitive activities are doomed in California and seriously threatened in the other primary source states where the mistaken precepts of that decision may be adopted. The "Oklahoma connection" and the peculiarities of that state's prohibition upon selective wholesaler franchising

will be substituted by erroneous judicial determination for the primary source laws enacted by the state legislatures.

Such interference with the determinations of the state legislatures as to the alcoholic beverage control structure they deem best for their purposes is not merely a disquieting throwback to that era when courts sat as "superlegislatures to review the wisdom" of statutory enactments. Equally disturbing in terms of the importance of the issues raised by the judicial invalidation of the California statute is the adverse effect upon competition there and in any other state where the courts may adopt the same mistaken rationale. Even a cursory look at the competitive structure of the liquor business in Oklahoma evidences the stultifying effects upon interbrand competition which can be anticipated with the effective elimination of wholesaler designation which the *Williams* decision augurs and the resulting cessation of those volume-building services a franchised wholesaler is responsible to the supplier of a brand for furnishing. Compared to the more than one hundred wholesalers in California, under Oklahoma's no-franchise requirement the number of wholesalers has declined from more than twenty to not more than six, two of whom account for 60 percent of all sales in the state. Posted wholesaler markups have become identical. Hundreds of brands sold in California are unavailable to consumers in Oklahoma. New brands introduced in California and elsewhere are not distributed in Oklahoma. A few leading, nationally advertised brands command a disproportionately high share of the Oklahoma markets in comparison with their showing in California and other franchise states.

Wholesaler promotional services to build the volume of any brand in competition with those of other suppliers are non-existent in Oklahoma. In essence, competition and consumer demand are determined solely at the distiller level and substantially in terms of only the small number of brands which are nationally advertised. Even those brands fail to reach their maximum potential because

of the lack of local wholesaler support. At the consumer level, the trade in the metropolitan areas is dominated by a few large retailers (one of whom accounts for approximately 10 percent of total sales in the state) whose volume permits them to sell at prices which hold down the number of retailers because smaller stores cannot compete.

A markedly similar picture has emerged in Minnesota in the last few years since that state adopted a requirement that suppliers sell to all wholesalers, thereby prohibiting designated wholesaler franchises.[4] By contrast, to encourage more effective competition, Kansas has recently substituted an exclusive distributorship requirement for its former requirement that suppliers sell to all wholesalers, and there has been a substantial increase in the number of brands available and competing with the leading brands there.

Reasons for Granting the Writ

In its *Williams* decision, the California court has decided federal questions of substance in conflict with the applicable decisions of this Court and in direct conflict with a recent decision of the Supreme Court of Kansas, from which an appeal taken to this Court was dismissed this Term for want of a substantial federal question. The erroneous invalidation below of the California designated wholesaler or primary source statute has already prompted suits challenging such statutes enacted in other states and, unless overturned, is likely to precipitate litigation in many other courts, state and federal, attacking not merely primary source requirements but also other provisions of the alcoholic beverage control laws of numerous other states. The impact of *Williams* in California and elsewhere, if that decision is adopted by other courts, will be (1) the undermining of state regulations controlling the importation and structuring of the distribution of such

4. While it requires sales to all wholesalers of any brand sold there, Minnesota, unlike Oklahoma, prohibits Minnesota wholesalers from selling elsewhere unless authorized by the brand owner or supplier. (Minn. Stats. Ann., §§340.114 and 340.145)

beverages within their borders, contrary to the delegation of such powers to the states by the Twenty-first Amendment, and the forcing upon them of Oklahoma's prohibition of wholesaler franchises, (2) the upsetting of requirements designed to simplify and make more certain the auditing and collection of the very substantial tax revenues realized by the states from such beverages, and (3) a diminution in the vigorous interbrand competition now prevailing in the alcoholic beverage industries which will result from the destruction of effective supplier designation of wholesalers on a selective basis. Absent such designation, wholesalers can no longer be willing and able to undertake the obligation to furnish those services designed to maximize sales of the brands franchised to them in competition with the numerous brands of other suppliers.

A. In Striking Down California's Designated Wholesaler/Primary Source Law On Asserted Federal Antitrust Grounds, The *Williams* Case Conflicts With Controlling Decisions Of This Court And Of The Kansas Supreme Court.

The court below erroneously found that the designated wholesaler/primary source requirement of §23672, on its face and without reliance upon any showing of adverse competitive effect,[5] violates the Sherman Act. The state court held (A8-A9):

> "The designation statute gives brand owners the unfettered power to restrain competition . . . by merely deciding who may and may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine. . . .
>
> ". . . The statute goes much further than to merely allow a manufacturer to determine to whom it will sell;

5. A2 n.1

it allows the manufacturer to forbid others to sell to a disfavored importer. . . ."

That the California court was misconstruing or disregarding this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), is highlighted by its treatment of that controlling precedent (A10):

> "We find the decision in [*Sylvania*] to be inapposite to the statutory provision which we consider. That case involved a manufacturer's chosen method of product distribution enforced by a refusal to sell to retailers outside of their assigned territories. Petitioners herein do not attack the decision of distillers to refuse to trade with them; rather, they attack the state provided authority of the distillers to prohibit them from trading with others. Nothing in [*Sylvania*] authorizes a state to delegate such power to a private party."

The Court's rationale in *Sylvania* clearly was not limited to unilateral refusals to deal with purchasers who disregard a supplier's restrictions upon where or to whom they can resell. By overruling the *per se* holding of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court unequivocally re-established the proposition that vertical non-price restrictions, including even territorial confinement of an exclusive distributor, require a rule-of-reason evaluation even when effected solely by the private action or agreement of those parties, because such restrictions fail to meet the "demanding standards" for invoking the *per se* rules (*i.e.*, a "pernicious effect on competition and lack of any redeeming virtue"). (433 U.S. at 50)

More specifically, as noted earlier, in *Sylvania* this Court recognized that vertical restrictions going beyond a refusal to deal other than just with those franchised by or acceptable to the supplier, notwithstanding their reduction or even elimination of intrabrand competition at the level of the distributors, by stimulating the designated distributors to provide pro-competitive promotional serv-

ices can enhance competition overall, heightening the thrust of the supplier's products in interbrand competition with those of competing suppliers.[6] (433 U.S. at 50-59)

In short, the state court's conclusion that *Sylvania* is inapposite to its determination that California's designation statute violates the Sherman Act because it delegates to private parties "the unfettered power to restrain competition" by allowing "manufacturers to forbid others to sell to a disfavored importer" squarely conflicts with what this Court in fact decided in *Sylvania*.[7] Without any *per se* violation of the antitrust laws, suppliers in the alcoholic beverage industries could condition their sales to Oklahoma wholesalers, vertically restricting and forbidding them to resell outside that state. *Sylvania* would require proof by the rule-of-reason standard that an unreasonable restraint of trade resulted from any such restriction before an antitrust violation could be found.[8] Only the peculiarities of the Oklahoma liquor laws, not any principle of federal antitrust law, prohibit suppliers from imposing

6. Interbrand competition, the Court declared, is the "primary concern of the antitrust laws" and the ultimate protection of consumers, because without it no amount of intrabrand competition can insure the availability of substitute competing products and the "significant check on the exploitation of intrabrand market power" thus provided by the existence of interbrand competition. (433 U.S. at 52 n.19).

7. In holding that the designated wholesaler requirement of the California statute, on its face, constitutes a *per se* violation of the Sherman Act, the state tribunal ignored the teaching of this Court that before conduct can be characterized as subject to any *per se* rule "inquiry must focus on whether . . . the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

8. Supplier refusals to sell for resale outside a given area in order to avoid the disruptive effect on their marketing operations in other areas in which they maintain exclusive or selective distributorships have been sustained. See, *e.g.*, *Naify* v. *McClatchy Newspapers*, 599 F.2d 335 (9th Cir. 1979). *Cf. Dakota Wholesale Liquor, Inc.* v. *State of Minnesota*, 457 F.Supp. 480 (D. Minn. 1978), *aff'd per curiam*, 584 F.2d 847 (8th Cir. 1978) (denial of preliminary injunction).

such restrictions, and the California designation statute merely enables suppliers to establish in that state a distributional structure neither less nor more restrictive than permitted by the Sherman Act.[9]

Just this Term, in *Colby Distributing Co., Inc.* v. *Lennen*, 227 Kan. 2d 179, 606 P.2d 102 (1980), *appeal dismissed sub nom. Grant-Billingsley Wholesale Liquor Co., Inc.* v. *Lennen*, 49 U.S. Law Week 3331 (Nov. 3, 1980) (No. 80-189), this Court has reviewed a decision of the Kansas Supreme Court which upheld, on the basis of the Twenty-first Amendment and also as not repugnant to the federal antitrust laws and Constitution, a far more restrictive primary source requirement than that of the California statute at issue here. While §23672 permits intrabrand competition in that a supplier is free to designate more than one wholesaler in any marketing area and the statute neither imposes nor requires any limitations upon the territory served by any wholesaler, the Kansas statute, in addition to providing that no wholesaler is to sell a brand other than pursuant to a written agreement with the supplier, also prohibits all intrabrand competition between wholesalers. The Kansas statute mandates that the territory within which the designated wholesaler is authorized to sell is to be specified and that no supplier can "grant a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory." (Kan. Stats. Ann., §§41-101, *et seq.*)

9. The California court's statements, repeated throughout its opinion, that §23672 gives to suppliers or brand owners an unfettered or unqualified power to restrain trade and that their decisions are "final" disregard the availability of federal antitrust suits. Neither the California statute nor the primary source requirements of most of the other states even purport to immunize selective wholesaler designation or franchises, let alone any vertical restrictions upon resale, from the antitrust laws. If any such arrangements result in an unreasonable restraint of trade, then antitrust actions in federal court, with a full rule-of-reason evaluation, are available to private parties and government enforcement officials, just as is the case with respect to the provision of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13) that nothing therein shall prevent sellers "from selecting their own customers in bona fide transactions not in restraint of trade. . . ."

On appeal to this Court, the parties challenging the Kansas statute urged, as they had before the state courts, that its delegation of authority to private parties to establish exclusive, territorially confined distributorships was in *per se* violation of the Sherman Act. Rejection of those *per se* contentions by the Kansas Supreme Court establishes a direct conflict between its decision in the *Colby* case and that of the California court in *Williams*. If this Court's summary dismissal of the appeal from *Colby* for lack of a substantial federal question was not solely upon Twenty-first Amendment grounds, then *Colby* further evidences the conflict between *Williams* and the decisions of this Court.

WSWA and NBWA submit that §23672 does not contravene, purport to authorize or mandate any violation of the Sherman Act. Without exception, the decisions of this Court establish that in order to find a state statute repugnant to the antitrust laws it must compel action by private parties which is a *per se* or other clear violation. In another case involving a challenge to state liquor regulations based upon alleged Sherman Act grounds, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45 (1966), this Court declared:

> "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446. We find no such clear conflict in the present case. . . . [The state regulation] imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of [the state regulation]."

By contrast, in the recent case of *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court upheld a line of California state court

decisions[10] striking down California's price posting requirements for wine and spirits. Those decisions, however, involved California's total delegation to private parties of the unsupervised power to set minimum resale prices to be charged by the purchasers of their brands. Such vertical price-fixing, lacking even the pretense of state review or involvement, constituted a *per se* violation of the Sherman Act on the face of the statutes and without more.

B. The *Williams* Case Conflicts With Controlling Decisions Of This Court And Of The Kansas Supreme Court As To The Authority Of The States Under The Twenty-first Amendment To Enact Designated Wholesaler/Primary Source Laws.

Even if the California and other primary source statutes violated the Sherman Act, any claim of federal pre-emption would necessarily fall because of the power granted to the states by §2 of the Twenty-first Amendment, which provides that "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The California court rejected the applicability of the Amendment without analysis other than its *ipse dixit* that "the designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution." (A12) Concluding instead that the state's interests, allegedly in conflict with the competitive objectives of the Sherman Act, must be reconciled with those federal interests, the court applied its own mistaken balancing test and found the state interests lacking. This determination is wholly at odds and in conflict with the long line of Twenty-first Amendment decisions of this Court, including *Midcal* (and possibly the summary dismissal of the appeal from *Colby*).

10. See *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978); *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Board*, 87 Cal. App.3d 996, 151 Cal. Reptr. 492 (1979); *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App.3d 979, 153 Cal. Rptr. 757 (1979).

From its adoption, the Twenty-first Amendment has been accorded a broad sweep by this Court. Particularly germane are several decisions. Directly contrary to the conclusions of the court below, for example, is the characterization by Justice Brandeis in *State Board* v. *Young's Market Co.*, 299 U.S. 59, 63 (1936), "Can it be doubted that a State might . . . channelize desired importations by confining them to a single consignee?" As Justice Black stated in his dissenting opinion in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 339 (1964):

> ". . . [T]his Court in *State Board* v. *Young's Market Co.* . . . said that a State is perfectly free to set up a state liquor monopoly or to confer a liquor monopoly upon some one dealer in the State. It is equally obvious that New York is free to allow only a limited number of dealers to engage in the liquor business. It might do this because it wanted to discourage consumption, or to make it easier to police the liquor traffic, or to accomplish some other objective the State thought worthwhile to protect against the evils which can flow from the traffic. In particular, New York might want to see that sales are not diverted to Idlewild from other dealers licensed and regulated by the State."

Based upon the Twenty-first Amendment, in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972), the Court sustained a South Carolina requirement that producers could ship alcoholic beverages into that state only to an employee located there. The Court held that the requirement that sales be localized in South Carolina was an appropriate exercise of the state's power under the Twenty-first Amendment and was not merely a subterfuge to subject out-of-state sellers to taxation contrary to the provisions of 15 U.S.C. §381. Reiterating that "by virtue of [the provisions of the Twenty-first Amendment] a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders" (409 U.S. at 283), the Court concluded

that the South Carolina requirement did not violate the Commerce Clause. Just as the designated wholesaler or primary source requirements in California and elsewhere are part of overall, complex and integrated regulatory schemes of similar character, the South Carolina local sale requirement was evaluated by the Court as an integral part of the total regulatory structure of that state:

> "South Carolina's Alcoholic Beverage Control Act is a long and detailed statute. Requirements that certain records be kept by the manufacturer, the wholesaler and the retailer pervade the scheme. There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records. . . .
>
> "The requirement that before engaging in the liquor business in South Carolina a manufacturer do more than merely solicit sales there is an appropriate element in the State's system of regulating the sale of liquor. . . ." (409 U.S. at 282-283)

By analogy, California should be free to require purchases only from the primary source suppliers accountable to the state and to exclude sales by Oklahoma wholesalers not subject to the same responsibilities and controls.

More recently, in *Midcal,* this Court reiterated that "the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (445 U.S. at 110) Thus, while the federal government retains some Commerce Clause authority over intoxicating beverages, as this Court's decisions demonstrate, restrictions upon importation and the structuring of their distribution systems are a matter of "virtually complete control" by the states. The extent to which this special authority granted to the states by the Twenty-first amendment must be weighed in favor of their regulations in balancing the extent of any conflicting federal interests is

delineated by *Midcal,* was disregarded by the court below, and places the *Williams* decision in sharp conflict with *Midcal* and the earlier decisions of the Court.

The clear federal interest at issue in *Midcal* was price competition and the *per se* outlawing of private vertical price-fixing—an interest of paramount importance to the competitive objectives of the Sherman Act and involving conduct determined to be without justification or defense because of its "pernicious effect on competition and lack of any redeeming virtue." This prime federal competitive goal was opposed only by California's claimed interest in temperance and the preservation of small retailers against their larger competitors. In *Midcal,* however, California had "shown less than an enthusiastic interest in its wine pricing system" (445 U.S. at 111 n.12), and there were evidence and findings both by California's administrative agency responsible for alcoholic beverage control and by its courts that in fact the asserted state interests were not advanced by resale price-fixing. Emphasizing the importance of preserving the regulatory power granted to the states, this Court noted that "the findings and conclusions of [the California] courts are not binding on this Court to the extent they undercut state rights guaranteed by the Twenty-first Amendment." Nevertheless, on the record there was no basis for disagreeing with the California courts' conclusions, which were reasonable and supported by the only evidence of record:

> ". . . Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians."

With no basis for supporting the claimed state interests, therefore, this Court ruled that the "unsubstantiated state concerns put forth in this case simply are not of the same stature as the goals of the Sherman Act" and "the Twenty-first Amendment provides no shelter for the violation of

the Sherman Act by the State's wine pricing program." (445 U.S. 111-114)

In conflict with the rationale set forth in *Midcal,* the court below expressly rejected the contention that the California designated wholesaler/primary source statute "is within the state's virtual complete control over whether to permit importation or sale of liquor and how to structure the distribution system." Purporting to balance the allegedly competing state and federal interests, the California court, with no analysis other than its equating the wholesaler designation statute with "the price maintenance laws" previously overturned, initially placed upon the federal tray of the scale a conclusion defying any possible counter-weight: "The grant of power to a private party to prohibit interstate commerce between other private parties and to limit competition in the California wholesale market results in a complete undermining of the federal policies embodied in the Sherman Act." Understandably, thereafter, the court totally dismissed any state interests "purportedly served by the designation statute," including facilitating the monitoring and tracing of distilled spirits, aid in the collection of excise taxes, maintenance of the three-tier system of distribution, and preserving the competitative viability of small retailers. (A12-A14)

Even if it were assumed that §23672 somehow violates the Sherman Act, it is clear, for the reasons discussed in the preceding section of this brief and analyzed by this Court in *Sylvania,* that even the most restrictive vertical arrangements any supplier could adopt under the aegis of that statute might stimulate trade and commerce by promoting vigorous interbrand competition. There can be no reasoned basis, therefore, for the lower court's conclusion, without benefit of any evidentiary showing, that the designation statute completely undermines the federal policies of the Sherman Act or that it fails to vindicate the legitimate state interests dismissed by the court.

In its dismissal of the appeal from the Kansas Supreme Court's decision in the *Colby* case for want of a substantial

federal question, this Court presumably concluded either that the far more restrictive primary source statute there did not violate the Sherman Act or that the Twenty-first Amendment reserves to the states the power to enact such regulations. While the absence of any basis for the Sherman Act claims there or here seems so apparent, if this Court dismissed the appeal in *Colby* on Twenty-first Amendment grounds, then *Williams* conflicts not only with the decision of the Kansas Supreme Court but presumably with the view of the Amendment applied by this Court in reviewing that case.

C. The *Williams* Decision Raises Significant And Recurring Problems Of Great Moment To The Regulation Of Alcoholic Beverages And The Competitive Vigor Of Their Distribution In Many Other States, Threatens Continuing Litigation And Demonstrates The Need For Clarification Of This Court's Prior Twenty-first Amendment Decisions.

The importance of the *Williams* case far transcends just its deleterious impact upon distilled spirits regulation and the competitive character of the trade in California. This much-publicized and erroneous decision has had and will continue to have substantial, far-reaching precedential impact in view of the similar designated wholesaler/primary source laws which exist in a majority of the license states. Its importance is underlined by the fact that, based upon the incorrect application by the California court of principles of federal antitrust law, pre-emption and supremacy, the primary source requirements of other states have already been challenged in pending litigation and the filing of additional suits asserting the same claims and raising the same issues is almost certain.[11] In situations

11. *H&H Distributing Company, Inc.* v. *Mississippi State Tax Commission, et al.*, Civil No. J80-0323(N), S.D. Miss. (Jackson Div.); *Mile Hi Wholesale Liquors, Inc.* v. *Alan Charnes, Executive Director of the Department of Revenue, State of Colorado*, Case No. 80 C.V. 8844, Dist. Ct., City & County of Denver, State of Colorado.

such as this, where a holding brings into question the constitutionality or validity of statutes in force in many states, the Court has granted certiorari to review a state court decision invalidating a state statute on federal repugnancy grounds. *New York* v. *O'Neill*, 359 U.S. 1, 3 (1959).

Other than the primary source requirements, various provisions of essentially every state regulatory structure impose restrictions upon the trade in alcoholic beverages, prohibiting acts and practices pursuant to vertical arrangements which promote competition in other industries. To illustrate, many state regulations prohibit or control the extension of credit or granting of discounts by wholesalers to retailers. The erroneous rationale of *Williams* would not only appear to support invalidation of these state restrictions upon competition but also raises troublesome questions whether wholesalers complying with these regulations, should they be overturned, could be found to have been parties to a combination in *per se* violation of the Sherman Act[12] while such provisions were in effect. In fact, a suit has just been filed in federal court in San Francisco against California wholesalers alleging a Sherman Act price-fixing conspiracy in consequence of their having complied with a state regulation restricting discounts, requiring posting of prices with the state control agency and allowing, prior to the effective date, only downward revision of prices to meet lower prices posted by competitors for the same period.[13] Apparently on the authority of the *Williams* decision, it is alleged that these regulatory requirements are unconstitutional because they restrain competition and provide a means for price-fixing.

WSWA and NBWA submit that it is imperative that this Court review the decision below because of its broad importance to competition in and state regulation of the alcoholic beverage industries. Particularly is that true

12. Cf. *Catalano, Inc.* v. *Target Sales, Inc.*, 100 S. Ct. 1925 (1980); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

13. *Enrico's Inc.* v. *Baxter Rice, et al.*, Civil No. 81-0068 SC, N.D. Cal.

inasmuch as the *Williams* decision purports to be premised upon this Court's decision in *Midcal*. Reiteration and clarification of the *Midcal* rationale will avoid the controversy and confusion which *Williams* is generating. See *SEC* v. *United Benefit Life Insur. Co.*, 387 U.S. 202, 207 (1967); *Afroyim* v. *Rusk*, 387 U.S. 253, 255-256 (1967). The extensive recurrence of the issues raised here and the conflicting treatment they have received by two state courts fully merit this Court's definitive restatement of the governing principles in matters of great importance to all of the alcoholic beverage industries and the state legislatures and agencies which regulate them. *International Brotherhood of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 287 (1957); *International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 366 U.S. 667, 671 (1961).

Conclusion

For the reasons stated, the petitions for writ of certiorari should be granted.

Respectfully submitted,

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Nos. 80-1012, 80-1030, and 80-1052

In the Supreme Court of the United States

OCTOBER TERM, 1980

BAXTER RICE, DIRECTOR,
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA, PETITIONER

v.

NORMAN WILLIAMS COMPANY, ET AL.

BOHEMIAN DISTRIBUTING COMPANY, PETITIONER

v.

NORMAN WILLIAMS COMPANY, ET AL.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA,
PETITIONER

v.

NORMAN WILLIAMS COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a California statute that prohibits a person licensed by the State to import distilled spirits into the State from purchasing or accepting delivery of any individual brand of distilled spirits unless he has been designated as an authorized importer by the brand owner conflicts with Section 1 of the Sherman Act.

2. Whether the California statute is valid under the Sherman Act in any event by virtue of the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

3. Whether the California statute is valid in any event by operation of the Twenty-first Amendment to the Constitution.*

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* Questions 2 and 3 need be reached only if the Court were to conclude that the California statute, on its face, conflicts with the Sherman Act. Cf. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-106 (1980). Because we believe it clear that there is no such conflict, we do not address Questions 2 and 3 at any length.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Section 23661 of the California Business and Professions Code provides that alcoholic beverages may be brought into California from outside the State for delivery or use within the State only if the beverages are consigned to a licensed importer. Cal. Bus. & Prof. Code § 23661 (West Cum. Supp. 1981).[1] Section 23672 of the Business and Professions Code, at issue in this case, provides in pertinent part that "[a] licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." Cal. Bus. & Prof. Code § 23672 (West Cum. Supp. 1981).

This provision, commonly referred to as the designation statute, is the amended version of a statute first enacted in 1973. The 1973 statute provided that any importer wishing to import a particular brand had to be designated as an authorized importer by the licensee (either the brand owner or its California agent; see 80-1012 Pet. 6-7) who filed the minimum retail price schedule for the brand that was then required by state law. 80-1030 Pet. App. 3a-4a; see ch. 707, 1973 Cal. Stats. 1283.

In *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476, 146 Cal. Rptr. 585 (1978), the California Supreme Court held that the State's statutory scheme requiring the filing of minimum price schedules for distilled spirits was invalid

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[1] Section 23775 of the Code provides that an importer's license "shall be issued only to a person or manufacturer who holds a license authorizing the sale for resale [*i.e.*, a licensed wholesaler] of the types of alcoholic beverages mentioned in the importer's license." Cal. Bus. & Prof. Code § 23775 (West 1964).

under Section 1 of the Sherman Act, 15 U.S.C. 1. The California Supreme Court's holding was effectively affirmed by this Court in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in which the Court held that California's parallel minimum price system for wine constituted resale price maintenance in violation of the Sherman Act. The California Department of Alcoholic Beverage Control interpreted the California Supreme Court's decision in *Rice* to render the designation statute unenforceable. The Department reasoned that because, under *Rice*, no one was required to file a minimum price list for a particular brand, the requirement in § 23672 that a licensed importer could receive distilled spirits from out of the State only if he were designated by the person required to file the minimum price list was of no effect as well. 80-1030 Pet. App. 4a; 80-1012 Pet. 7-8.

2. The Department's conclusion that the California designation statute could not be enforced did not, of course, bar the brand owners themselves from dealing only with certain importers in California or from seeking to limit the number of such importers in California who would handle the brand. However, the brand owners' ability to accomplish this through their own contractual relationships was undermined by the operation of certain provisions of Oklahoma law. The alcoholic beverage laws of that State require any distiller or brand owner that sells to Oklahoma wholesalers to sell to *all* licensed wholesalers on a nondiscriminatory basis. Okla. Stat. Ann. tit. 37, § 533 (West Cum. Supp. 1980). Oklahoma law further authorizes such wholesalers to sell, *inter alia*, to any "qualified persons" out of state. Okla. Stat. Ann. tit. 37, § 521(e) (West Cum.

Supp. 1980). These provisions apparently were understood to bar a distiller or brand owner who wished to sell to Oklahoma wholesalers from insisting that the wholesalers decline to sell to persons who wished to import the liquor into California without authorization from the distiller or brand owner. 80-1030 Pet. App. 4a. Therefore, licensed importers in California who were not authorized by a brand owner to deal in its brand were nevertheless able to obtain supplies through Oklahoma wholesalers. We have been informed that on many occasions liquor orders placed by California importers through Oklahoma wholesalers were shipped directly from the distiller to the California importer, without passing through or coming to rest in Oklahoma. This state of affairs became known as the "Oklahoma connection." Thus, the only way in which the brand owner could have prevented this importation by unauthorized wholesalers in California would have been to refuse to sell its brand to *any* wholesaler in Oklahoma.

Apparently, to meet the conditions created by the unenforceability of the designation statute and the emergence of the "Oklahoma connection," the California Legislature enacted Assembly Bill 499 in 1979 to amend the designation statute effective January 1, 1980. As amended, the designation statute now prohibits a licensed importer from importing any brand of distilled spirits into California unless he has been designated as an authorized importer by the brand owner or the owner's authorized agent.

3. Prior to the effective date of Assembly Bill 499, three licensed but undesignated importers who had been taking advantage of the Oklahoma connection,

together with four affected retailers, filed an application for a writ of mandate in the California Court of Appeal to enjoin enforcement of the new law.

a. The Court of Appeal held that the designation statute, on its face, conflicts with Section 1 of the Sherman Act. The premise of this holding was that the conduct of a brand owner, acting pursuant to the designation statute, in effectively preventing an undesignated California importer from purchasing distilled spirits from an independent Oklahoma wholesaler would constitute a per se violation of Section 1 of the Sherman Act. Thus, the court rejected petitioners' contention that this case is controlled by *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), in which this Court held that vertical territorial restraints should be judged under the rule of reason, rather than under a per se rule of illegality. The Court of Appeal distinguished *GTE Sylvania* on the ground that it involved only "a manufacturer's chosen method of product distribution enforced by a refusal to sell to retailers outside of their assigned territories." 80-1030 Pet. App. 9a. In the instant case, the Court of Appeal observed, the non-designated California wholesalers did not attack the *brand owners'* refusal to trade with them. Rather, the court noted, "they attack the state provided authority of the distillers to prohibit them from trading with *others* [*i.e.*, the Oklahoma wholesalers]." *Ibid.* (emphasis added). The court found this distinction critical, concluding that "[n]othing in *Continental T.V., Inc.* v. *GTE Sylvania Inc.* authorizes a state to delegate such power to a private party." *Ibid.*[2]

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[2] In the same vein, the court below rejected the contention "that brand owners have the inherent power to designate

b. The Court of Appeal also concluded that the designation statute is not within the "state action" exception to the Sherman Act. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-106 (1980). The court observed that, although the State licensed the non-designated wholesalers to engage in the importation of liquor, it then left to private parties the "unfettered power to restrain them from engaging in the trade for which they are licensed." The court stressed that the State specifies no standards to be applied by private parties in "reaching their decisions to forbid competition," does not oversee the designations, and does not otherwise participate in the designation function. 80-1030 Pet. App. 10a.

c. Finally, the Court of Appeal concluded that the Twenty-first Amendment does not shield California's designation statute from invalidity under the Sherman Act. Initially, the court stressed that the statute "does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution" (80-1030 Pet. App. 11a)—the areas that the court found to be at the core of the State's power under the Twenty-first Amendment. *Ibid.*, citing *Midcal*, *supra*, 445 U.S. at 110. In balancing the asserted state interests advanced in support

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importers to whom they will sell and that the designation statute merely recognizes this power." 80-1030 Pet. App. 8a. In the court's view, "[t]he statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturers to forbid others to sell to a disfavored importer." *Ibid.*

of the statute[3] against the federal interest in favor of free competition expressed in the Sherman Act (see *Midcal, supra*, 445 U.S. at 110-114), the court determined that the state interests were not sufficiently strong to insulate the designation statute from invalidity under the Sherman Act. In the balancing process, the court concluded that the designation statute will not "clearly vindicate" the state interests, and that those interests could be advanced through the alternative means of direct regulation by the State of additional aspects of liquor importation (80-1030 Pet. App. 13a-14a).

The California Supreme Court denied review. 80-1030 Pet. App. 16a.

DISCUSSION

Since the decision below, there have been legal developments in Oklahoma that cast some doubt upon the interpretation of Oklahoma law that underlay the Court of Appeal's conclusion that the California designation statute conflicts with the Sherman Act. The Court may therefore wish to hold the petitions in this case pending a final resolution of the questions of Oklahoma law. Alternatively, the Court may wish to grant the petitions and remand the case to the Court of Appeal for further consideration in light of these

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[3] It was argued that the designation statute would facilitate the monitoring and tracing of imported distilled spirits, aid in the collection of excise taxes, assist in the maintenance of California's three-tier system of distribution, preserve the competitive viability of small retailers, prevent predatory business practices, protect the brand owner's right to its goodwill, promote stable labor relations, and promote temperance. 80-1030 Pet. App. 12a.

and future developments and the views expressed in this brief. Another possibility would be for this Court or the court below to certify the question of Oklahoma law to that State's Supreme Court, in accordance with Okla. Stat. Ann. tit. 20, § 1602 (West Cum. Supp. 1980).

If the Court does not hold the petitions, remand the case to the Court of Appeal, or certify the question of Oklahoma law, summary reversal of the judgment below may be appropriate. The decision of the Court of Appeal holding that the California designation statute conflicts with Section 1 of the Sherman Act is plainly incorrect. Unlike the system of resale price maintenance prescribed by the California statute involved in *Midcal*, which is illegal per se under Section 1 of the Sherman Act, the nonprice vertical restraints that may be facilitated by California's designation statute must be judged under the "rule of reason." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). Only by looking at the circumstances of a particular distiller's—or all distillers'—designation of importers could it be determined whether that conduct unreasonably restrains competition in violation of the Sherman Act. Consequently, the Court of Appeal erred in holding that the designation statute, on its face, conflicts with the Sherman Act. Accordingly, the judgment below should be reversed, and the Court need not consider the application in the present context of the "state action" exemption to the antitrust laws or of the Twenty-first Amendment.

1.a. On March 5, 1981—after the petitions for certiorari in this case were filed—the Attorney General of Oklahoma issued an opinion (No. 81-57) to the Oklahoma Alcoholic Beverage Control Board concluding that the open wholesaling requirements of

Oklahoma law apply only to shipments terminating in Oklahoma.[4] Under the Attorney General's construction, Oklahoma law would not bar distillers or other brand owners from insisting that Oklahoma wholesalers not resell to California importers who had not been designated by the brand owners. If the brand owners imposed such limitations, the "Oklahoma connection" would disappear, and the brand owners therefore would not require the aid of California's designation statute to cut that connection. In these circumstances, the practical impact of the decision below on the importation of distilled spirits into California would be quite limited.

By the same token, if Oklahoma law does not grant an Oklahoma wholesaler an absolute right to ship a particular brand to an unauthorized California importer, the rationale of the Court of Appeal's decision striking down the designation statute is undermined. An apparent premise of that court's decision was that the Oklahoma wholesaler to whom the brand owner sells his product is, as a matter of Oklahoma law, wholly independent of any contractual restraints imposed by the brand owner with respect to the terri-

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[4] The Attorney General reasoned that the Oklahoma liquor laws were intended for the protection of Oklahoma residents and were not intended to afford Oklahoma wholesalers a right to sell liquor to wholesalers in another state in a manner that would be inconsistent with the other state's alcoholic beverage control laws. He further reasoned that whether the out-of-state customer of an Oklahoma wholesaler is a "qualified person" to whom a wholesaler is entitled to sell under the Oklahoma statutes must be determined by federal law and by the laws of the recipient state.

A copy of the Attorney General's opinion has been lodged with the Clerk of this Court.

tory within which it can resell the product.[5] Respondents concede as much. They acknowledge (Br. in Opp. 13-14) that under *GTE Sylvania*, a manufacturer may impose reasonable territorial restrictions on its own franchisee as a condition of doing business and that *GTE Sylvania* "may well allow a distiller to prohibit his own franchisee from reselling his brand to a third party in another state." *Id.* at 13. Thus, respondents' argument that a per se rule of invalidity applies to any efforts by a brand owner to sever an unauthorized California importer's "Oklahoma connection" is based entirely on the premise that, *under Oklahoma law*, the goods must be "legally available" to undesignated California importers irrespective of the brand owner's wishes. *Ibid.*[6] Under the Oklahoma Attorney General's opinion, this premise is incorrect.

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[5] See, *e.g.*, 80-1030 Pet. App. 8a (the Court of Appeal states that the designation statute "gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller").

[6] Respondents make this argument by distinguishing Oklahoma wholesalers from franchisees (Br. in Opp. 13-15), apparently on the basis that a distiller must sell to *all* Oklahoma wholesalers who wish to purchase its products and cannot "franchise" or select only certain Oklahoma wholesalers with whom it will deal. But if the Oklahoma Attorney General's interpretation of Oklahoma law is correct, the distiller or brand owner could restrict Oklahoma wholesalers from selling the brand to a person *outside* of Oklahoma, at least where, as here, the law of the state where that person resides prohibits the purchase. So interpreted, Oklahoma law would allow brand owners to adopt what amounts to a franchise system for out-of-state sales and, if they chose, to refuse to "franchise" any Oklahoma wholesaler to sell to undesignated California importers.

b. However, on August 11, 1981, a state district court in Oklahoma entered an injunction permanently restraining the Oklahoma Alcoholic Beverage Control Board from implementing the Attorney General's opinion. *Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Board*, No. CJ-81-1413 (Dist. Ct. Okla. Cty).[7] The court concluded that the Oklahoma constitution and statutes require a non-resident distiller to sell to Oklahoma wholesalers even where the Oklahoma wholesalers intend to sell the products to wholesalers in other states. Under the Oklahoma district court's opinion, non-designated California importers will be able to resume their "Oklahoma connection."

We have been informed by the Office of the Attorney General of Oklahoma that the Attorney General has filed an appeal from this decision to the Oklahoma Supreme Court and that an appeal has also been taken by two distillers that intervened in the case. We cannot know, of course, what the outcome of these appeals will be. But because the antitrust issue in this case, as framed by the California Court of Appeal and by respondents in support of the judgment below, depends on interpretations of Oklahoma law that have not yet been finally resolved, the Court may wish to hold the petitions in this case pending a final resolution of the issues of Oklahoma law or to certify the pertinent questions of Oklahoma law to that State's Supreme Court. Alternatively, the Court may wish to grant the petitions and remand the case to the California Court of Appeal for further consideration in light of the recent developments in Oklahoma. The Court of Appeal might then hold the case pending a final resolution

[7] A copy of the court's opinion from the bench has been lodged with the Clerk of this Court.

of the Oklahoma litigation. Even if the Oklahoma Supreme Court were finally to construe Oklahoma law in a manner that leaves the "Oklahoma connection" intact, a remand would allow the Court of Appeal an opportunity to reconsider its holding that the California designation statute conflicts with the Sherman Act. As we explain below, the Court of Appeal's conclusion on that issue was clearly incorrect, and a remand would give the Court of Appeal the benefit of the views expressed herein by the agency charged with enforcing the antitrust laws.

2.a. In considering the Sherman Act issue in this case, it is important as an initial matter to stress the limited reach of the designation statute. That statute provides only that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of the brand by the brand owner. The statute does not limit the *number* of importers the brand owner may designate to import its brand. Nor does the designation statute require that a designated importer sell the imported brand to retailers only within a specified territory or from a specified location within the State of California. The statute leaves the brand owner free to confine sales of its brand by each designated importer to a particular location or territory, or to allow them to compete against one another throughout the State. And, finally, the statute does not even appear to require that a designated importer purchase only from the distiller or other brand owner, as the primary source laws of many states require. See note 18, *infra*. A licensed California importer who has been designated by the brand owner to purchase the brand would appear to be free under the designation statute to purchase the brand from a

wholesaler in another state—including, presumably, those in Oklahoma.

As can be seen, the bare statutory requirement that a licensed importer be designated by the brand owner before it can purchase or receive the brand from outside of California does not *require* that any particular type or degree of vertical restraints be imposed by the brand owner; that is a matter for the brand owner to determine, subject of course to whatever restrictions on the distribution of liquor may be imposed by other provisions of California law not at issue here. Viewed in this way, and contrary to the conclusion of the Court of Appeal (80-1030 Pet. App. 8a), the primary thrust of the designation statute merely is to recognize the inherent right of *any* manufacturer to select or franchise wholesalers through whom its products will be sold or distributed.

Because the designation statute does not require a brand owner to impose vertical restraints of a kind that may violate the Sherman Act, the fact that a particular brand owner might abuse its powers in imposing such restraints (and might rely on the designation statute to police them) is not a basis for invalidating the statute on its face. *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45-46, 52 (1966). In the absence of an inconsistency with federal law, there is no reason to displace valid state interests in regulating liquor that the statutory designation requirement may serve—such as monitoring and tracing of imported distilled liquor, aiding in the collection of excise taxes, or even facilitating the vertical imposition of *pro*-competitive territorial restraints. See 80-1030 Pet. App. 12a. The purposes of the antitrust laws would be fully served by recognizing that the designation statute does not insulate the

brand owner's conduct from scrutiny under the antitrust laws. Indeed, petitioners Bohemian Distributing Co. and Wine & Spirits Wholesalers of California—a licensed importer and an association of such importers and wholesalers, respectively—acknowledge that the designation statute does not compel or authorize conduct that would violate the Sherman Act and expressly *concede* that the statute does not shield a brand owner and its designated importers from accountability under the antitrust laws for the manner in which they structure the distribution of a particular brand. 80-1030 Pet. 10; 80-1052 Pet. 15.[8]

Thus, because the designation statute, unlike the resale price maintenance statute involved in *Midcal*, does not compel the conduct that is asserted in this case to be in violation of the Sherman Act, the Court of Appeal erred for this reason alone in holding that the designation statute on its face conflicts with the Sherman Act and in ordering the Director of the Department of Alcoholic Beverage Control to refrain from enforcing the designation requirement. See 80-1030 Pet. App. 15a. If the Court reverses the judgment below on this ground, respondents of course would remain free to bring an action in federal district court charging a distiller with a violation of the Sherman Act because of the manner in which it utilized its power under the designation statute to impose territorial restraints.

b. The Court of Appeal also erred in concluding that the California designation statute is in conflict with Section 1 of the Sherman Act insofar as it en-

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[8] Petitioner Rice, the Director of the California Department of Alcoholic Beverage Control, does not argue to the contrary in the petition in No. 80-1012. He does not address the point.

ables a brand owner to prevent a California importer who has not been designated by the brand owner from purchasing that product from an Oklahoma wholesaler. As respondents concede (Br. in Opp. 2, 6-17), the court's holding was based solely on its conclusion that this conduct by a brand owner would constitute a per se violation of the Sherman Act.[9] This conclusion is incorrect.

In *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court held that the legality of vertical territorial restrictions, unlike such horizontal restrictions, must be judged under the rule of reason, rather than by application of a rule of per se illegality.[10] Consequently, in the ordinary private set-

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[9] The court did not address any of the economic considerations relevant to a rule of reason analysis, either with respect to the liquor distribution system in California generally or with respect to the vertical restraints imposed by particular distillers. The court did not carefully analyze the statute's impact on either intrabrand or interbrand competition, and it made no analysis of any numerical indicators of market structure at the wholesale level. Similarly lacking is any discussion of evidence relevant to any potential pro-competitive effects of vertical distribution restraints on interbrand liquor competition. For example, the court failed to discuss whether such restraints might entrench current market leaders, or conversely facilitate successful new entry, or have a neutral effect. In short, the court's decision contains nothing that would enable us to venture an opinion in this case on whether any lessening of intrabrand competition in liquor distribution is outweighed by the potential benefits of increased interbrand competition attributable to vertical territorial allocations. That issue is not before the Court, however, because the court below applied a per se rule of illegality.

[10] The basis of this Court's decision in *GTE Sylvania* was that vertical territorial restrictions might in some instances

ting, a manufacturer legally may enforce a vertical territorial allocation through contractual provisions providing for the termination of any distributor that sells outside its territory, as long as the net effect of the practice is not anticompetitive.[11] Thus, putting to one side the effect of Oklahoma law, it is clear that under the Sherman Act, a distiller would be free to authorize only certain wholesalers in California to import and distribute its product and that the distiller could enforce this restriction by prohibiting its wholesalers in other states from selling to unauthorized wholesalers in California, so long as the distiller's restrictions did not impose an *unreasonable* restraint on competition. In the absence of the California designation statute, however, distillers do not have available this private enforcement mechanism to control the distribution of their products in California, because Oklahoma law has been construed to require a distiller to sell to *all* Oklahoma wholesalers without restriction on subsequent sales of the product to unauthorized California wholesalers.[12] Only by not selling in Oklahoma at all could a distiller effectively prevent unauthorized wholesalers in California from importing and distributing its product in California.

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promote interbrand competition—for example by creating incentives to distributors to provide "point-of-sale" services, such as promotional activities, for an individual brand. 433 U.S. at 54-57.

[11] For example, the agreement in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), rev'g 194 F.Supp. 562 (N.D. Ohio 1961), provided that a distributor could be terminated for selling outside its territory. See 194 F.Supp. at 566-568.

[12] As we have explained in point 1, this interpretation of Oklahoma law is being challenged in the Oklahoma courts.

Thus, the California designation statute merely cancels out the effect of Oklahoma law by restoring to a distiller or brand owner the power that Oklahoma law had taken away: the power to impose territorial restrictions in California by limiting the number of wholesalers who may import and distribute the brand in California. The net result is the same as if neither the relevant provisions of Oklahoma law nor the California designation statute had ever been enacted and the brand owner were free to impose such territorial restrictions through its contractual relationships with wholesalers in Oklahoma.[13] Because under this court's decisions such non-price vertical restraints must be evaluated under the rule of reason, it follows that the court below erred in concluding that a brand owner's actions pursuant to the designation statute that have the effect of barring unauthorized California wholesalers from dealing in its product constitute a per se violation of Section 1 of the Sherman Act.[14]

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[13] Of course, the designation statute gives the force of state law to a brand owner's selection of wholesalers to import its product. This fact alone has no incremental effect on competition, because, as we have explained above (see pages 13-14, *supra*), the designation statute does not insulate that selection from scrutiny under the antitrust laws.

[14] The result is the same even if the California designation statute is analyzed without regard to the provisions of Oklahoma law that apparently led to its enactment. Because vertical territorial restraints might, on balance, actually promote competition in a particular case (*Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*, 433 U.S. at 54-57; see note 10, *supra*), state enforcement of such restraints through a designation statute would in those circumstances further rather than conflict with federal antitrust policy.

The California Court of Appeal, nevertheless, concluded that, in giving the distiller "the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller," the designation statute confers "a clear power to restrain interstate trade * * *." 80-1030 Pet. App. 8a. But an Oklahoma wholesaler is "independent" of any territorial restraints imposed by a distiller—even those that would be lawful under the Sherman Act under the rule of reason—*only* because Oklahoma law has deprived the distiller of the ability it would otherwise have to impose such restraints in its contractual relations with the wholesaler. The California designation statute eliminates this independence of the Oklahoma wholesaler from the distiller with respect to sales to California wholesalers by affording the distiller a *substitute* for whatever contractual provisions it might otherwise negotiate with Oklahoma wholesalers restricting such sales. The only difference is that the designation statute prohibits unauthorized California wholesalers from purchasing or receiving liquor from an Oklahoma wholesaler, rather than barring an Oklahoma wholesaler from selling or delivering the distiller's brand of liquor to unauthorized California wholesalers, as the distiller might provide in its own contracts with the Oklahoma wholesalers. But because the effect on competition in California is essentially the same, there is no basis for analyzing the former under a rule of reason but subjecting the latter to a per se rule of illegality.[15]

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[15] The court's references to limiting the rights of "independent" buyers and sellers might also reflect sociopolitical concerns that, on occasion, might be inconsistent with promoting competition. Cf. *Continental T.V., Inc.* v. *GTE Sylvania*

3. Because the Court of Appeal erred in concluding that the California designation statute conflicts with the Sherman Act, this Court need not consider whether the statute is insulated from invalidity by the "state action" exemption under the antitrust laws [16] or by the Twenty-first Amendment.[17] And be-

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Inc., supra, 433 U.S. at 53 n.21. The antitrust laws protect competition, not competitors, and it is not always the case that maximizing the number of sellers in a market redounds to the public's benefit. See generally 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 104, at 8-12 (1978).

[16] As we have explained above (see pages 12-14, *supra*), the designation statute itself does not require the conduct that is alleged to violate the Sherman Act in this case—*i.e.*, the failure by distillers to designate certain California wholesalers to sell their products (whether purchased from Oklahoma wholesalers or elsewhere). Thus, if that conduct is found to violate the Sherman Act under the rule of reason or even a per se rule, that conduct is not protected by the "state action" exemption. See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975); see also *Midcal, supra*, 445 U.S. at 104-106. Similarly, because the conduct at issue here is undertaken as a matter of private volition, the restraints of the Commerce Clause on state action are not pertinent.

[17] Petitioner Rice does not identify in his certiorari petition or reply brief the state interests that are furthered by the designation statute. Nevertheless, we can conceive that California might have a legitimate interest in requiring that wholesalers be designated by a distiller before they may import the distiller's brand, in order to facilitate the monitoring of importation and collection of excise taxes. Moreover, the circumstances of the amendment of the designation statute in 1979, apparently in reaction to the emergence of the "Oklahoma connection," suggest that the statute has the further purpose of facilitating the imposition of territorial restraints by wholesalers because of their possible competitive advantages. But we have considerable doubt that vertical restraints imposed by an individual distiller (and enforced through the designation

cause the error of the Court of Appeal on the Sherman Act issue is sufficiently clear (involving only a straightforward application of this Court's recent decision in *GTE Sylvania, supra*), and because it arises out of a unique factual situation that does not implicate questions of broad importance,[18] the Court may

process) that would be anticompetitive and therefore *violate* the Sherman Act in a particular case would be sufficiently supported by legitimate state interests to be sustained under the Twenty-first Amendment despite the Sherman Act violation. See *Midcal, supra*, 445 U.S. at 110-114. This is particularly so in view of the fact that the designation statute does not require any specific type of vertical restraints and therefore cannot be thought to further any identifiable state interests in affording a distiller a means by which it may facilitate those restraints that prove to be anticompetitive.

[18] Contrary to the contention of petitioners (80-1012 Pet. 28-32; 80-1030 Pet. 2-3, 5, 10-11; 80-1052 Pet. 5 & n.7) and amici state liquor commissions (Br. 3, 13-18), Wine & Spirits Wholesalers of America (Br. 18-20), and United States Brewers Association (Br. 2, 9), we do not believe that the opinion of the California Court of Appeal in this case calls into question the validity of a broad range of state liquor laws, including the "primary source" laws in effect in a number of jurisdictions that require an in-state wholesaler to purchase directly from the distiller. See Appendix E to the petition in No. 80-1052 for a list of such statutes. Although petitioners and amici attempt to analogize California's designation statute to primary source laws, the designation statute does not provide that designated California importers must purchase the brand only from the distiller, as would be the case under a primary source law.

Moreover, the California designation statute does not impose any standards for a distiller's distribution system other than the bare requirement that it formally designate its wholesalers. A primary source law, in contrast, requires a particular method of distribution and therefore more clearly reflects articulated state interests of the kind that may be given appropriate weight under the "state action" exemption and the Twenty-first Amendment.

wish to consider summary reversal of the judgment below.

CONCLUSION

The Court may wish to hold the petitions pending a final determination of the question of Oklahoma law that was critical to the judgment below, or grant the petitions, vacate the judgment below, and remand to the California Court of Appeal for further consideration in light of the recent and future developments in the Oklahoma courts and the views expressed herein. Another possibility would be for this Court or the court below to certify the underlying question of Oklahoma law to the Supreme Court of Oklahoma. Alternatively, the Court should grant the petitions. If it does so, it may wish to consider summary reversal of the judgment below on the ground that the California designation statute does not, on its face, conflict with Section 1 of the Sherman Act.

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WINE & SPIRITS WHOLESALERS OF CALIFORNIA,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, *et al.*

Joint Brief of Petitioners Bohemian Distributing Company and Wine & Spirits Wholesalers of California in Reply to the Brief of the United States as Amicus Curiae.

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INTRODUCTION.

The United States has concluded that the decision below is both wrong and worthy of review by this Court and suggests summary reversal as an appropriate disposition of the case. (United States brief at 8, 20-21.) Petitioners concur. Alternatively, the United States suggests that the Court consider deferring a decision on the merits pending a final

resolution of certain issues of Oklahoma law. For the reasons discussed below, this alternative to an unqualified summary reversal of the decision below is not warranted.

DISCUSSION.

In its brief the United States correctly observes that the court below did not consider any evidence concerning the impact of California Business & Professions Code § 23672 ("the Designation Statute") on the marketing of distilled spirits in California. (United States brief at 15, n. 9.) The simple fact is that the Court of Appeal's decision turned solely on its determination that the Designation Statute, on its face, is preempted by § 1 of the Sherman Act. Because, as the United States asserts, that determination is "plainly incorrect," the decision below is wrong and should be summarily reversed at this time.

Postponement of decision on the merits of this case pending clarification of Oklahoma law would serve no useful purpose. It would continue indefinitely the doubt cast by the decision below on the designation statutes and primary source laws of other jurisdictions and would impair important California interests.[1]

No possible interpretation of Oklahoma's open wholesaling law by the Oklahoma courts could have any bearing whatever on the correctness of the decision below, for two reasons. *First*, contrary to the view of the United States (United States brief, *passim*), the Court of Appeal did not ground its decision on the existence of the "Oklahoma connection." Its invalidation of the Designation Statute was

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[1]Furthermore the open-wholesaling system, with its exportation features, is not an Oklahoma invention. For example, the Kansas legislature recently dropped its open wholesaling provision but exportation is still allowed "as permitted by law." (Kan. Stat. Ann. § 41-306.) Minnesota requires open wholesaling and only recently restricted exports by distributors. (Minn. Stat. Ann. § 340.145.)

expressed in sweeping terms, not dependent upon whether Oklahoma law does or does not permit brand owners contractually to restrict out-of-state sale of distilled spirits by Oklahoma wholesalers. *Second*, as stated in the United States brief, the California statute does not on its face violate the Sherman Act, and "[t]he result is the same if the California Designation Statute is analyzed without regard to the provisions of Oklahoma law . . ." (United States brief at 17, n. 14.)

It is true that an interpretation of Oklahoma law by the Oklahoma Supreme Court that permitted distillers to preclude Oklahoma wholesalers from selling outside that state would alleviate one of the problems which the Designation Statute is designed to solve. But the disappearance of the "Oklahoma connection" would neither eliminate the mischief done by the decision below nor otherwise warrant action by this Court that would leave the decision in effect for an indefinite period.

The most important reason why the petitions for certiorari should be granted is that the decision below is of nationwide significance. The Court of Appeal's analysis and application of the Sherman Act casts doubt upon the validity of the designation statutes or primary source laws in at least seventeen other states and the District of Columbia. Contrary to the suggestion in the brief of the United States (at 20, n. 18), the laws of at least three of those states — Connecticut, Illinois and Nebraska — are similar in substance and effect to California's Designation Statute. Those States require that wholesalers obtain the authorization of the brand owner or distiller to market his brands but, like California, do not expressly require that a designated wholesaler purchase only from the brand owner or distiller. (Conn. Gen. Stat. Ann. § 30-6; Ill. Ann. Stat. ch. 43, § 126; Neb. Rev. Stat. § 53-130.) These statutes are indistinguishable from

the Designation Statute for purposes of analysis under the federal antitrust laws.

There are some technical differences between the Designation Statute and the specific provisions of the primary source laws in the remaining fourteen states and the District of Columbia (cited in Appendix E to petition for certiorari of Wine and Spirits Wholesalers of California) However, all of those statutes are functionally the same for antitrust purposes, in that they facilitate the vertical imposition of pro-competitive restraints on wholesale distribution. (*Cf.* United States brief at 13.) The reasoning of the Court of Appeal applies to primary source laws as fully as it does to the Designation Statute.

The decision below should also be reversed now because it impairs important interests of California. Among other things, California has a legitimate interest in requiring that wholesalers be designated by distillers in order to facilitate monitoring of importation, to aid in the collection of excise taxes, and to reinforce, because of their perceived interbrand competitive advantages, the imposition of vertical restraints by distillers. (See discussion in United States brief at 19, n. 17.) Moreover, if decision of this case on the merits were delayed, California's interest in the immediate and continuing enforcement of the Designation Statute would be frustrated during the interim. The consequence would be the effective imposition upon California, each day that the decision of the Court of Appeal continued in effect, of an alien system of liquor importation and wholesaling, destructive of California's longstanding method of distribution reflected in the Designation Statute. Under these circumstances, a declination to resolve immediately the antitrust issues presented in this case could be justified, if at all, only if a

decision on the merits were dependent on the meaning of Oklahoma law.[2] As we have shown, it is not.

Moreover, if Oklahoma law were ultimately to be interpreted to permit the enforcement in Oklahoma of private agreements restricting resale by Oklahoma wholesalers to California importers, this would provide no guarantee that Oklahoma wholesalers would refrain from breaching those agreements. Similarly, wholesalers in other states may surreptitiously sell distilled spirits to nondesignated importers in California in violation of agreements with distillers prohibiting such sales. The decision of the Court of Appeal deprives California of the capability of protecting itself, through enforcement of the Designation Statute, against such forbidden importations. Surely California cannot be relegated, on the basis of a mistaken interpretation of the federal antitrust laws, to reliance upon private actions by distillers in other states to prevent sales to nondesignated California importers. Neither should California be subject to the potential disruptive effect of future legislation of any other state, including Oklahoma. Furthermore, failure to reverse the decision below could well constitute a disservice to the Federal Government. The United States recognizes that California's enforcement of private vertical restraints through the Designation Statute may "further rather than

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[2]*Cf. Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) ("Where . . . it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States' "); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964) (Abstention unwarranted where the parties did not request it and where the litigation was already long delayed); *Harmon v. Forssenius*, 380 U.S. 528, 537 (1965) (The refusal of a federal district court to abstain was not error "[g]iven the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals").

conflict with federal antitrust policy." (United States brief at 17, n. 14.)[3]

Conclusion.

The appropriate action for the Court to take in this case is to grant the petitions for certiorari and reverse the decision below summarily.

If the Court should decline to take that action, the next most appropriate action would be to grant the petitions for certiorari and set the case for plenary adjudication.

If the Court should decline to decide this case on the merits at this time, the appropriate action would then be to grant the petitions for certiorari, vacate the judgment below, and remand to the California Court of Appeal for further consideration in light of the United States' analysis of the antitrust issues.

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[3]The United States notes, correctly, that because the Designation Statute does not conflict with the Sherman Act, this Court need not consider whether the statute is insulated from invalidity by the state action exemption or the Twenty-first Amendment. (United States brief at 19.) The reasons why, if those issues were reached, the petitions for certiorari should be granted and the decision below reversed are set forth in the petition for certiorari of Wine & Spirits Wholesalers of California at 20 (state action exemption) and 21-25 (Twenty-first Amendment).

As we have shown, no useful purpose would be served by delaying the resolution of this case pending clarification of the law of Oklahoma.

Respectfully submitted,

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On Petitions for Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

REPLY TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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REPLY TO AMICUS CURIAE BRIEF OF THE UNITED STATES

I
INTRODUCTION

The Amicus Brief of the United States offers this Court several alternatives for disposing of this matter. Those alternatives are presented against the background of several assumptions made by the United States, including: (1) the case is not important nationally; (2) the heart of the controversy could disappear if the Oklahoma Supreme Court rules on a pending appeal in a way that cuts off the supply of liquor to the Respondents, (3) the statute serves no legitimate state interest that could justify restraints in violation of the Sherman Act and (4) the California decision that the Sherman Act would be violated was wrong in light of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The last assumption is incorrect. The case was correctly decided and is not in derogation of *Sylvania*. More importantly to this Court in considering the petition, the other three assumptions *are* correct. First, the California designation statute (Cal. Stats. 1979, Ch. 280 § 1 amending Cal. Bus. & Prof. Code § 23672 referred to hereinafter as "A.B. 499") *is* sui generis. (See U.S. brief at p. 20, fn. 8) Second, if in a matter pending before it the Oklahoma Supreme Court interprets its law to permit distillers to refuse to sell to Oklahoma wholesalers who resell to out-of-state wholesalers and if that interpretation is not disturbed, the ruling from which petitioners seek relief will be of little practical significance even in California. Third, while the U.S. speculates about the existence of a state interest, it recognizes that such an interest would not be such as to overcome the effect of a violation of the Sherman Act.

II

DISCUSSION

Because the result below does not disturb the principles of *Sylvania,* the Court need not and should not grant the petition. Even if there is doubt about the reach of *Sylvania,* the Court should resolve that doubt in a case that is of more than contingent significance even to the parties and where it has application to something more than a statutory scheme peculiar to California.

The United States takes the position that *Sylvania* establishes a rule of reason for vertical restraints and that A.B. 499 facilitates nothing more. Accordingly, the U.S. argues that A.B. 499 must be judged under a rule of reason and there can be no *per se* conflict between the state statute and the Sherman Act.

Contrary to the brief of the U.S., if anything is "plainly incorrect," it is the contention that A.B. 499 facilitates only a *Sylvania*-type restraint. As Respondents pointed out in their Consolidated Brief in Opposition ("Opposition") (pp. 8-17), the restriction inherent in A.B. 499 is not a restriction imposed by a single distiller upon his own franchisees. Rather, the statute would empower distillers and their franchisees to prohibit commerce between two third parties whose source of liquor is independent of the franchise system. Put another way, under the statute interstate commerce in goods that already have moved beyond a franchise system would be the subject of a naked restraint imposed by distillers and their franchisees.

The California court looked at the purpose, effect and pervasiveness of the restraint, rather than depending upon

a metaphysical determination of that restraint as "vertical" or "horizontal" and concluded that the restraint should be prohibited *per se*. That conclusion was correct as to a statute that would restrain trade each time it was invoked by any distiller.

The state court implicitly found that the statute would have a tendency to raise prices by eliminating the discounting wholesalers and accordingly found that it was *anti*-competitive. The United States at least agrees that A.B. 499 is intended to negate the effect of an Oklahoma law, namely, the requirement that distillers sell to all comers. (See U.S. Brief at p. 18)

The purported "competitive advantages" of the statute never have been identified, either by the United States or elsewhere. The question still remains: what procompetitive benefit does the statute have which possibly could outweigh its tendency to increase prices and reduce the number of competitors who would exist in a free market.

Respondents have pointed out that A.B. 499 carries none of the benefits usually associated with *Sylvania*-type restrictions. (Opposition pp. 15-17) While *Sylvania* found that vertical restrictions may encourage franchisees to provide warranty services, that supposed benefit has no application here. Moreover, the tendency of *Sylvania* restrictions to encourage advertising by franchisees provides no argument for a benefit since the justification for liquor regulation is to encourage temperance rather than advertising. As this Court has held, a *per se* rule should be applied to practices which nakedly restrain trade without any countervailing benefits. A.B. 499 clearly falls into this category.

We turn from the anti-trust violation inherent in the statute to whether there was a Twenty-first Amendment salvation in the form of a valid state regulatory purpose. Private interest groups conjured up a number of possible interests and offered them in argument to the judicial system of California. The California courts decided correctly there was no such interest. It is curious that the United States hypothesizes "competitive advantages" (Amicus Brief p. 19, fn. 17) for a regulatory measure for which the state's court could find no purpose.

In any event, this Court last term in *California Retail Liquor Dealers Assn. v. Midcal,* 455 U.S. 97, 103-106 (1980) set the guidelines for determining when the Sherman Act should preempt state liquor laws. Having set these guidelines, this Court can now allow the lower courts to apply them and consider the issue again only if a clear conflict develops between the lower courts. Conflict with other states is not presented here because of the uniqueness of the California statute.

III
CONCLUSION

The Amicus Brief of the United States is helpful in placing the dispute advanced by the instant petitions in its proper perspective. The result below is consistent with this Court's decision in *Sylvania*. As the United States observes, a Sherman Act violation of the type found by the California courts is not shielded by the Twenty-first Amendment because neither the executive nor the judicial branch of California government has been able to identify a valid State purpose. For all of these reasons, the petitions should be denied.

Dated: September 24, 1981

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Petitioner,

v.

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLANT DISTRICT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Under the Twenty-first Amendment grant to the states of virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system, does a state have the power to enact legislation prohibiting a licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner?

2. Does the California statute which prohibits a licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner create a per se violation of the Sherman Act?

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[1] In addition to the parties listed in the caption, there were also two intervenors in the Court below: Bohemian Distributing Company, a California corporation, petitioner in consolidated case No. 80-1030, and Wine and Spirits Wholesalers of California, a California corporation, petitioner in consolidated case No. 80-1052.

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No. 80-1012

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLANT DISTRICT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

CITATION TO OPINION AND JUDGMENTS OF COURTS BELOW

Norman Williams Co., et al. v. *Rice* 108 Cal.App.3d 348 (1980); petition for hearing denied by Supreme Court of the State of California, September 24, 1980.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeal, Third Appellate District, State of California, was entered in an original proceeding before that Court on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980. Petition for certiorari herein was filed on December 22, 1980, within 90 days after the case became final in the courts of California. This Court's jurisdiction is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case include:

United States Constitution, article 1, section 8, clause 3 (Commerce Clause):

> "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States . . . ."

United States Constitution, amendment XXI, section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation

of the laws thereof, is hereby prohibited."

15 United States Code section 1 (Sherman Act):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations, is declared to be illegal . . . ."

Statutes of California 1979, chapter 280, section 1 (A.B. 499, Liquor Importer Designation Statute):

"23672 (Business and Professions Code). A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent . . . ."

Statutes of California 1979, chapter 407, section 1 (Liquor Price Affirmation Statute):

"23673 (Business and Professions Code). No brand owner of distilled spirits or his agent shall sell any brand of distilled spirits to a wholesaler or rectifier in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler or rectifier during any calendar month anywhere in any other state or in the District of Columbia or to any state or state agency which owns or operates retail distilled spirits stores.

"In determining the lowest price for which any brand of distilled spirits is sold in any other state or the District of Columbia or to any state or state agency which owns and operates retail distilled spirits stores, appropriate reduction shall be made to reflect all discounts, all rebates, allowances, and other inducements of any kind whatsoever offered or given to any such wholesaler or state, or state agency,

as the case may be, purchasing such brand of distilled spirits in such other state or in the District of Columbia or to the state or state agency which owns or operates retail distilled spirits stores; provided that nothing in this section shall prevent differentials in price which make only due allowance for differences in state excise taxes and fees and the actual cost of delivery. As used in this section, the term 'excise taxes and license fees' shall mean the excise taxes imposed or the fees required by any state or the District of Columbia."

Other relevant statutes and regulations are set forth in the Joint Appendix.

STATEMENT OF THE CASE

In November 1979, respondents herein (petitioners below) filed an original mandate petition in the California Court of Appeal, Third Appellate District, seeking to prevent the enforcement of a recently enacted amendment to the California Alcoholic Beverage Control Act, Business and Professions Code section 23672, scheduled to go into effect on January 1, 1980. (J.A. 2.) Intervention was permitted by Bohemian Distributing Company, a California corporation (petitioner in consolidated case No. 80-1030), and Wine and Spirits Wholesalers of California (petitioner in consolidated case No. 80-1052). (J.A. 3.) On December 31, 1979, the Court of Appeal issued an alternative writ of mandate directing instant petitioner Rice, Director of the Department of Alcoholic Beverage Control, to refrain from enforcement of Business and Professions Code section 23672 pending further order of the Court. (J.A. 4.)

On July 17, 1980, the Court of Appeal issued its opinion and peremptory writ of mandate ordering Rice to permanently refrain from enforcing the statute in question. (J.A. 9.) Petition for hearing in the California Supreme Court was denied on September 24, 1980. (J.A. 10.) On September 25, 1980, the Court of Appeal reissued its peremptory writ of mandate permanently preventing enforcement of the statute. (J.A. 10.)

Petition for certiorari was filed in this Court on December 22, 1980. Certiorari was granted by this Court on November 30, 1981.

In 1973, the California Legislature enacted Business and Professions Code section 23672 which prohibited a state licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he was designated as an authorized importer by a licensee who filed the minimum retail price schedule for that brand in accordance with the existing state fair trade liquor statutes.[2] That latter licensee was necessarily the brand owner, or the brand owner's California agent.

This statute was strictly enforced by the California Department of Alcoholic Beverage Control until 1978,

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[2] California Statutes 1973, chapter 707, section 1:

"23672. A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as the authorized importer of such brand by the licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

when the California Supreme Court ruled that the state distilled spirits fair trade statute was in violation of the Sherman Act.[3] At that time, because minimum retail price schedules were no longer permitted, the Department took the position that, as there was no longer any licensee available who could file a minimum retail price schedule, it would no longer enforce the statute.

Among the respondents are licensed importers and wholesalers of distilled spirits as well as licensed retailers of distilled spirits. The importer respondents, no longer being under enforceable statutory restraint, secured sources of supply of national brand distilled spirits in Oklahoma and imported them into California.

This was permissible under Oklahoma law which provided that a distiller choosing to sell distilled spirits in that state had to sell to all licensed Oklahoma wholesalers and could not discriminate either as to price or as to quantity.[4] The distiller was required to sell distilled spirits at a rate which was no higher than the lowest rate which the seller sold in any other state.[5] The licensed wholesalers could sell to any licensed retailer or wholesaler within Oklahoma, and could sell distilled spirits out of Oklahoma to "qualified persons." [6]

In 1979, the California Legislature, purposely seeking to correct this new method of importation growing sporelike on the surface of the existing three-tiered stat-

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[3] *Rice* v. *Alcoholic Beverage Appeals Board,* 21 Cal.3d 431 (1978).
[4] Oklahoma Statutes 1961, volume 12, title 37, section 501 et seq.
[5] *Id.,* section 536.1, subdivision (a).
[6] *Id.,* section 521, subdivision (e).

utory structure of the state's liquor distribution system, amended the importer designation statute to read:

> "§ 23672. A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of a licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." [7]

The purpose of this amendment was to put the law back to where it was before the State Supreme Court declared the retail price maintenance law invalid;[8] i.e., the brand owner or his authorized agent was the only person who could file the minimum retail price schedule and hence designate the importer under the old law; the brand owner or his authorized agent is the only person who can designate the importer under the new law.

This amendment was to become effective on January 1, 1980. Respondents, however, successfully brought an original proceeding in the California Court of Appeal, Third Appellate District, for a writ of mandate permanently ordering the instant petitioner, Director of the California Department of Alcoholic Beverage Control, to refrain from enforcing that portion of Business and

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[7] Cal. Stats. 1979, ch. 280, § 1, p. 958. Only the first sentence was amended. The second sentence remained unchanged.

[8] *Rice* v. *Alcoholic Beverages Appeals Board, supra,* 21 Cal.3d 431 (1978).

Professions Code section 23672 which provides:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

(*Norman Williams Company, et al.* v. *Rice,* 108 Cal.App.3d 348, 353 (1980); ptn. for hrg. den. by Cal. Sup. Ct.)

The Court of Appeal found:

> ". . . that the substantial federal policies of the Sherman Act are violated by the liquor designation statute and, in light of clear alternatives to that statute, the state interests sought to be achieved are not sufficient to outweigh those policies. We conclude that Business and Professions Code section 23672, as amended by Assembly Bill Number 499 (Stats. 1979, ch. 280, § 1) is invalid to the extent it authorizes private action in restraint of trade." (*Norman Williams Company, et al., supra,* at p. 362.) (Pet'n for Cert., p. 35.)

Consequently, section 23672 has never gone into effect.

At the same session at which it enacted section 23672, the California Legislature enacted Business and Professions Code section 23673, a liquor price affirmation statute, to insure that California distilled spirits wholesalers would be able to purchase distilled spirits from brand owners at the same price paid by wholesalers in Oklahoma, or any other state.

Section 23673 provides:

> "No brand owner of distilled spirits or his agent shall sell any brand of distilled spirits to a wholesaler

or rectifier in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler or rectifier during any calendar month anywhere in any other state or in the District of Columbia or to any state or state agency which owns or operates retail distilled spirits stores.

"In determining the lowest price for which any brand of distilled spirits is sold in any other state or the District of Columbia or to any state or state agency which owns and operates retail distilled spirits stores, appropriate reduction shall be made to reflect all discounts, all rebates, allowances, and other inducements of any kind whatsoever offered or given to any such wholesaler or state, or state agency, as the case may be, purchasing such brand of distilled spirits in such other state or in the District of Columbia or to the state or state agency which owns or operates retail distilled spirits stores; provided that nothing in this section shall prevent differentials in price which make only due allowance for differences in state excise taxes and fees and the actual cost of delivery. As used in this section, the term 'excise taxes and license fees' shall mean the excise taxes imposed or the fees required by any state or the District of Columbia." [9]

This section became effective on January 1, 1980, and has been in operation since that date.

Although Business and Professions Code section 23673 was brought to the attention of the Court of Appeal, it failed to consider its effects with respect to the designa-

[9] Cal. Stats. 1979, ch. 407, § 1, p. 1499.

tion statute, section ~~26372~~ 23672. Had that Court done so, it could not have logically concluded that after the effective date of sections ~~26372~~ 23672 and ~~26373~~ 26373 there would be any material differential between the price paid to distillers by Oklahoma wholesalers or California wholesalers.

SUMMARY OF ARGUMENT

The initial approach to the validity of any state liquor statute concerning importation or distribution of liquor within a state should be through the Twenty-first Amendment. If the statute is clearly within the Amendment it should be free from the prohibitions of the Sherman Act. On the other hand, if it appears to be clearly within the Sherman Act, i.e., a delegated price-fixing statute, then it may be considered in the category of a per se violation of the Act. In those grey areas in between the two extremes, a court should look to see if the statute is possibly exempt from the Sherman Act, because of the Twenty-first Amendment grant of power to the states over the control of importation and structure of the liquor distribution system; within the state-action doctrine; or through application of a rule of reason test.

The instant California liquor importer designation statute is one directly within the express terms of the Twenty-first Amendment. It involves statutory restrictions on licensed liquor importer-wholesalers and prevents them from purchasing liquor for importation or distribution within the state unless they have been designated by the brand owner (distiller) to import

such brand. The statute directly concerns control over importation and structure of the California liquor distribution system. Its express purpose is to preserve the long established three-tiered structure of the California liquor distribution system by preventing the new fourth tier of operation created because of activities of undesignated importers. The Sherman Act is not applicable to the instant statute.

The Court of Appeal erroneously reached the conclusion that the Sherman Act rather than the Twenty-first Amendment was applicable because that court believed the statute required anti-competitive conduct by distillers which restricted importers and thereby affected the wholesale price of liquor.

The wholesale price of liquor is not a factor in this case. The Court of Appeal neglected to consider a newly enacted California price affirmation statute which went into effect on the same date the instant importer designation statute was to become operative. This new price affirmation statute was similar to that of Oklahoma, where distillers are required to sell to wholesalers (including respondent California licensed importer-wholesalers entitled to purchase in Oklahoma) at a price which is no higher than the lowest price offered to wholesalers anywhere in the United States. Since California now has a similar statute, the price distillers may charge to wholesalers in either state is necessarily the same.

In any event, the Court of Appeal should not have applied the Sherman Act without putting the California

liquor importer designation statute through a "rule of reason" analysis to test its conclusion. There admittedly is no per se violation of the Sherman Act in this case, yet the Court of Appeal took no evidence to aid it in reaching its conclusion.

ARGUMENT

I

THE TWENTY-FIRST AMENDMENT GRANTS TO THE STATES VIRTUALLY COMPLETE CONTROL OVER WHETHER TO PERMIT IMPORTATION AND HOW TO STRUCTURE THE LIQUOR DISTRIBUTION SYSTEM

The Twenty-first Amendment, section 2 provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."

This Court has recently iterated its long established position that the cited language gives an explicit grant of authority to the states with "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (*California Retail Liquor Dealers Assn.* v. *Midcal Aluminum,* (*Midcal*) 445 U.S. 97, 107, 110 (1980).)

The section by its express language gives to the states practically plenary power to legislate concerning "transportation or importation" of liquor inside their borders. Such legislation may concern not only whether such transportation or importation should be absolutely pro-

hibited or permitted, but also whether it should be permitted only under specifically prescribed conditions. (*Ziffrin, Inc.* v. *Reeves,* (308 U.S. 132, 138–139 (1939); see also *State Board* v. *Young's Market Co.,* 299 U.S. 59 (1936); *Mahoney* v. *Joseph Triner Corp.,* 304 U.S. 401 (1938).)

II

THE CALIFORNIA LIQUOR IMPORTER DESIGNATION STATUTE IS WITHIN THE EXPRESS PURVIEW OF THE TWENTY-FIRST AMENDMENT

California Business and Professions Code section 23672 is totally within the express language of the Twenty-first Amendment. It specifically concerns importation, and is directly related to the structure of California's liquor distribution system.

It provides:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

A. The Express Language Of The Statute Relates To Importation Of Liquor Into A State

As an elementary proposition, it should be noted at the outset that the Twenty-first Amendment uses the word "importation;" the California statute uses the word "importer."

The statute is a pure expression of the regulatory powers over liquor importation given to the states. It goes directly to who may be an importer of liquor into California.

Under the statute, importation is permitted only when two factors coincide: (1) the existence of an importer already investigated, found qualified, and licensed by the state; (2) the designation of a particular importer chosen by a brand owner from the pool of those importers already investigated, found qualified, and licensed by the state. Only then may a licensed liquor importer purchase or accept delivery of any brand of liquor into California.

B. The Statute Is Directly Related To And Preserves California's Historic Three-Tiered Structure Of The Liquor Distribution System

Like many states, the California alcoholic beverage distribution system is based on a three-tiered structure: (1) distiller to (2) California importer-wholesaler to (3) California retailer. (*California Beer Wholesalers Assn., Inc.* v. *Alcoholic Bev. etc. Appeals Bd.,* 5 Cal.3d 402, 407–408 (1971); see also *Harris* v. *Alcoholic Bev. etc. Appeals Bd.,* 61 Cal.2d 305, 309 (1964).)

The importer designation statute is expressly designed to preserve the three-tiered structure of that system. It prohibits persons such as respondent importer-wholesalers from purchasing through a fourth tier, the Oklahoma wholesaler whose activity allows circumvention of the California three-tiered system. Absent the statute as is presently the case with nondesignated importers such as respondents, the liquor moves from (1) distiller through (2) Oklahoma wholesaler, to (3) California importer-wholesaler, to (4) California retailer.

C. The California Court Of Appeal Erroneously Concluded That The Importer Designation Statute Is Not Within The Purview Of The Twenty-First Amendment

With no analysis whatever, the Court of Appeal erroneously reached the conclusion that section 23672 was completely outside the scope of the Twenty-first Amendment. It merely concluded that:

> "California has determined to permit the importation of liquor into the state by private parties and has established a distribution system of which the petitioners are a licensed part. In division 9 of the Business and Professions Code the state has provided detailed requirements for those who desire to engage in the distribution of alcoholic beverages and the petitioners have complied with those requirements and obtained state approval to participate in the distribution of liquor. The designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution. The designation statute, like the price maintenance laws, is precisely the type of regulation which must be reconciled with the federal interests in interstate commerce."
>
> (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d at p. 359.)

The Court of Appeal was clearly in error. It would appear axiomatic that if the Constitution grants the states power to legislate with respect to "transportation or importation" of liquor, a statute such as section 23672, which expressly provides for purchase and delivery

restrictions on a state licensed liquor importer-wholesaler, is directly within the constitutional grant of the power. A similar conclusion should have been reached regarding the structure of the distribution system, especially in view of the Court of Appeal's intimate familiarity with this Court's interpretation of the Twenty-first Amendment in *Midcal.*

III

THE TWENTY-FIRST AMENDMENT RATHER THAN THE COMMERCE CLAUSE IS APPLICABLE TO ANALYSIS OF THE VALIDITY OF A STATE STATUTE DEALING EXCLUSIVELY WITH LIMITATIONS ON A STATE LICENSED LIQUOR IMPORTER-WHOLESALER'S AUTHORITY TO IMPORT LIQUOR INTO THE STATE

Rules of constitutional interpretation require that each part of the Constitution necessarily should be treated with the same dignity (*Richardson* v. *Ramirez,* 418 U.S. 24, 25 (1974)); that no constitutional guarantee should be given preference over another, resulting in subordination or deletion (*Ullman* v. *United States,* 350 U.S. 422, 428 (1956)); that where it is necessary to compare and weigh two different provisions it should be done without nullifying or substantially impairing one or the other.

These rules must be applied here in order to determine whether the Twenty-first Amendment grant of power to the states over liquor importation and distribution should be held paramount to the Commerce Clause under which the Sherman Act was enacted.

When, in the context of the instant case, the powers granted to the states under the Twenty-first Amendment are compared with those given to Congress under the Commerce Clause, it becomes evident that wherever possible the Twenty-first Amendment should be treated as a specific enactment and the Commerce Clause as a general enactment.

The Twenty-first Amendment language directly encompasses the language of the instant California importer designation statute.

The Twenty-first Amendment provides:

> "The transportation or importation into any State . . . ; for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is . . . prohibited."

The importer designation statute reads:

> "A licensed importer shall not purchase or accept delivery of . . . distilled spirits unless he is designated as an authorized importer . . . by the brand owner."

Under the express language of this statute, an undesignated licensed importer-wholesaler who attempted to import intoxicating liquor into California for delivery therein would be in violation of California law and would also be prohibited from doing so by the express language of the United States Constitution.

Thus, there is no conflict between the California liquor importer designation statute and the Twenty-first Amendment. Nor, on its face, is there any conflict between the statute and the Sherman Act. Accordingly, absent any such statutory facial conflict with the Sher-

man Act, the Twenty-first Amendment is applicable. If a per se violation of the Sherman Act were required by a state statute, the result might be otherwise. The *Midcal* liquor price setting delegation is an obvious example. But where there is no statutory facial conflict with the Sherman Act, a court should take great care before it declares such a statute invalid. Otherwise, it may unwarrantedly give preference to one part of the Constitution over another.

In the instant case, the lower court failed to engage in such discernment. It admittedly was presented with a statute which, in its words, was ". . . difficult to analyze . . . in terms of common violations of the Sherman Act because of the unique nature of the statute." (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d 348, 356.) Yet it inexorably and with little analysis reached the conclusion that the statute was invalid.

A court's analysis of a state liquor statute dealing with importation and distribution of liquor within the state should begin with the powers granted to the state under the Twenty-first Amendment. If the particular statute on its face appears to be within that Amendment, great care in analysis should be taken before the conclusion is reached that the Sherman Act in any particular instance is in derogation of those state powers. Every effort should be made to uphold the protective grant of power given to the states by the Twenty-first Amendment and only in extreme cases should the Sherman Act be applied.

On the other hand, if it cannot be readily determined

from reading the statute whether it is in direct conflict with the Sherman Act, the approach should be to see if the Twenty-first Amendment exempts the statute from the Sherman Act prohibitions. The statute should be tested to see if it is within the Twenty-first Amendment grant of power to the states over control of importation and structure of the liquor distribution system;[10] within the state action doctrine;[11] or through a rule of reason test.[12]

In this way, harmony between the two parts of the Constitution will be maintained; neither part will be subordinated or deleted, and neither part will be nullified or substantially impaired.

IV

CALIFORNIA HAS A VALID STATE INTEREST IN PRESERVING THE THREE-TIERED STRUCTURE OF ITS LIQUOR DISTRIBUTION SYSTEM THROUGH ENACTMENT OF THE LIQUOR IMPORTER DESIGNATION STATUTE

While there are many reasons which might be cited to show a valid state interest for enactment of the California liquor importer designation statute, the one which stands out most clearly is the preservation of the structure of the three-tiered system of distribution in the liquor industry. This is the one, above all others, which can be clearly pointed to for evidence of specific legislative intent.

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[10] *Midcal,* supra.
[11] Parker v. Brown, 317 U.S. 341 (1943).
[12] Continental T.V., Inc. v. GTE Sylvania, Inc. 433 U.S. 36 (1977).

The California three-tiered system, together with some of the reasons why it was believed to be desirable, was discussed by the California Supreme Court in *California Beer Wholesalers Assn., Inc.* v. *Alcoholic Bev. etc. Appeals Bd., supra,* 5 Cal.3d at pp. 407–408. Many of the reasons for enactment of the California importer designation statute which have been suggested by intervenors and certain amicus curiae can also be given as reasons for supporting the three-tiered system.

The instant importer designation statute was specifically enacted to shut off the fourth tier activity which had arisen during the hiatus while the former statute prohibiting such activity was not being enforced by the California Department of Alcoholic Beverage Control. Respondent importer-wholesalers operate outside the California three-tiered system. They place orders with an Oklahoma wholesaler who buys from the distiller and sells to the ordering importer-wholesaler. A fourth tier is thus now in existence outside the statutory scheme: (1) distiller to (2) Oklahoma wholesaler to (3) California importer-wholesaler to (4) retailer.

The Court of Appeal recognized this intrusion on the structure of the liquor distribution system and the existence of a fourth tier, but attempted to bypass the legislative function entirely, by strangely concluding that the policy behind the three-tiered structure would be strengthened if this new fourth tier which the Legislature specifically attempted to prevent were permitted to operate. In a footnote, that court said:

"[3] The designation statute is actually directly con-

trary to the public policy behind the three-tier distribution system. The three-tier system was established to maintain the independence of the various levels of the liquor industry and to prevent the integration of manufacturing, wholesale and retail functions. [Citing *Harris* v. *Alcoholic Bev. etc. Appeals Bd., supra.*] The designation statute reimposes the dependency of wholesalers upon brand owners which the three-tiered system was designated to prevent." (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d at p. 360.)

Assuming arguendo, that the statute might be somehow contrary to the policy behind the three-tiered structure issue, a conclusion to which we take strong exception, particularly since the Legislature enacted this new statute and must know its own policy, the question is not whether it might or might not affect the legislative policy, but rather does it require judicial alteration of the three-tiered system. The Legislature is the only proper group with the power to make that determination. If the legislative policy behind the three-tiered system seems to a court to be jeopardized, the Legislature would be the only body authorized to make the change to a four-tiered system, not the court.

Unquestionably here, there is a vital question as to whether a state Legislature has the constitutionally granted power under the Twenty-first Amendment to determine whether its liquor distribution system should be three-tiered or otherwise.

Permitting a local state court to substitute its judgment as to the details of the structure of the liquor distri-

bution system on the theory that it has such power through interpretation of the Sherman Act, solely a federal ground, is to deny the *Midcal* confirmation of constitutional grant to the state Legislature to formulate any liquor distribution system whatsoever. To hold otherwise would mean that if a local court found any possible restraint of trade resulting from any liquor statute, it could strike it down regardless of what legislative policy may have been present at its enactment. The enormity of the situation which would result is easily envisioned when it is realized that practically every liquor statute has some restraint of trade feature connected to it; i.e., prohibition of activities such as giving free goods, special rebates, free displays and inventory shelving.

V

THE CALIFORNIA LIQUOR IMPORTER DESIGNATION STATUTE DOES NOT REQUIRE A PER SE VIOLATION OF THE SHERMAN ACT

A. The California Liquor Importer Designation Statute Does Not Require Any Per Se Violation Of The Sherman Act.

The Court of Appeal erroneously held that the California liquor importer designation statute, on its face, required a per se violation of the Sherman Act because it enabled a brand owner (distiller), by refusing to name a licensed importer-wholesaler as his designee, to prevent the undesignated importer-wholesaler from purchasing liquor from an Oklahoma licensed wholesaler.

The theory of the Court of Appeal was that the importer designation statute was completely analogous to

the price fixing statute it had successfully struck down in *Midcal Aluminum, Inc.* v. *Rice, supra,* 90 Cal.App.3d 979, aff'd sub nom. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).)

B. The Court of Appeal Opinion Is Based On A Fallacious Conclusion That The Instant Case Should Be Treated As A Per Se Violation Of The Sherman Act Because It Is So Closely Analogous To The Designation Of Price Setting Required By The Statute In *Midcal* That It Must Be Treated Exactly *As If It Were A Price Case*

1. Price Has No Part In The Instant Case

The Court of Appeal in the instant case starts with the presumption that the California importer designation statute so directly affects price that it must be considered as if it were a price case. It said, in its opinion:

> ". . . After the price maintenance provisions of the Business and Professions Code were declared invalid the importer petitioners secured sources of supply of national brand distilled spirits in Oklahoma, referred to as the 'Oklahoma connection.' Under Oklahoma law a distiller who chooses to sell distilled spirits in Oklahoma must sell to all licensed Oklahoma wholesalers and may not discriminate either as to price or as to quantity. (12 O.S. 1961, tit. 37, §§ 501 et seq.) The distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate at which the seller sells in any other state. (*Id.,* § 536.1, subd. (a).) The licensed wholesalers may sell to any licensed retailer or wholesaler within Oklahoma, and may sell distilled spirits out of Oklahoma to 'qualified persons.' (*Id.,* § 521, subd. (e).) The importer petitioners have been able to purchase na-

> tional brand distilled spirits in Oklahoma, import such distilled spirits to California, and sell these products to licensed retailers at prices below the suggested wholesale prices which the distillers provide to their designated wholesalers. . . . [The importer designation statute, Bus. & Prof. Code, § 23672] would effectively preclude the importer petitioners from competing for the wholesale market of certain national brands, because they have been denied designation as authorized importers by the brand owners. The petitioners thus will be unable to secure these brands from the distillers and are precluded from purchasing such brands from Oklahoma sellers." (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d 348.)

Without realizing the implication, the Court of Appeal reached its conclusion principally because of the fact that Oklahoma has a liquor price affirmation statute by which a distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate at which the seller sells in any other state. However, the Court of Appeal neglected to consider that commencing January 1, 1980, California also would have a similar price affirmation statute, Business and Professions Code section 23673:

> "No brand owner of distilled spirits or his agent shall sell any brand of distilled spirits to a wholesaler or rectifier in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler or rectifier during any calendar month anywhere in any other state . . . ." (Cal. Stats. 1979, ch. 407, § 1.)

With both states having price affirmation statutes after January 1, 1980, the price at which a brand owner could sell distilled spirits to a wholesaler in either Oklahoma or California would necessarily be the same. In her words, after the time the California importer designation statute, section ~~26372~~ 23402, was scheduled to go into effect, the prices wholesalers would have to pay brand owners in each state for similar merchandise would be the same.

This means that the Court of Appeal's treatment of the case as if it were a price case is totally without foundation. If wholesalers in California and wholesalers in Oklahoma would have to pay the brand owner the same price, the case becomes strictly one where the importer designation statute only relates directly to vertical restrictions in the distilled spirits industry.

2. Vertical Restrictions Are Not Per Se Illegal, And Those Cases Must Be Judged By Applicaton Of The Rule of Reason Instead Of The Doctrine Of Per Se Illegality

This Court has recently held, in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977), that vertical territorial restriction cases are to be decided by the rule of reason, not by the per se illegality rule, and price considerations are only one aspect of the analysis.

In the instant case the Court of Appeal, erroneously believing price was such an important factor, applied the per se doctrine and took no evidence as to whether the statute on its face interfered with competition. On that ground alone, the case should be reversed. Grounds for reversal become even stronger when, as indicated above, on the effective date of the statute in question,

California also had other legislation which went into effect that equated the California and Oklahoma wholesale distilled spirits prices. Thus, in the instant case, even if evidence were taken, the price to wholesalers necessarily would be the same (no higher than the lowest price at which the distiller sells in any other state), and the statute, on its face, would not affect price in any way.

C. The California Liquor Importer Designation Statute Does Not Require Any Conduct By Distillers Or Importers Which Violates The Sherman Act.

The California liquor importer designation statute does not require any distiller or importer-wholesaler to violate the Sherman Act. Such violation could occur, for example, if some conspiracy arose to freeze a particular importer-wholesaler out of a market. But should such conduct occur, the remedy would be by the affected damaged importer-wholesaler, civilly, or by the government, criminally, against the conspirators. Suit to stop enforcement of the designation statute itself because it might be abused by private parties is an improper method to correct the operation of a potential illegal activity.

CONCLUSION

The decision of the Court of Appeal is erroneous in that it gives greater status to the Commerce Clause (Sherman Act) than the Twenty-First Amendment in a situation directly involving state control over importation and structure of the liquor distribution system. The Twenty-first Amendment is applicable here because it is

a specific constitutional provision covering the very matter encompassed by the state statute: restrictions on importing liquor by state licensed liquor importer-wholesalers. The Sherman Act is not applicable here.

The Court of Appeal erroneously applied the Sherman Act instead of the Twenty-first Amendment because of its belief that the statute directly affected the price of liquor and thus the case should be treated as if it were a price fixing case. Actually, no price issue is involved because after the effective date in question, California also had another statute which prevented any distiller from selling to its wholesalers at any price higher than the lowest price charged wholesalers in any other state. Thus, because Oklahoma has a similar statute, the Oklahoma wholesale price, where the respondent California licensed importer-wholesalers are purchasing
liquor, is now necessarily the same as the California wholesale price.

In any event, whether price is peripherally involved, or not, the Court of Appeal erred when it failed to utilize the rule of reason analysis and took no evidence before it found the California importer designation statute invalid. This case is not a per se Sherman Act case and should not be treated as if it were.

The decision of the Court of Appeal should be reversed and its peremptory Writ of Mandate ordering petitioner Rice, Director of Department of Alcoholic Beverage Control of the State of California to desist from enforcing California Business and Professions Code section 23672 should be ordered withdrawn.

DATED: January 13, 1982.

Respectfully submitted,

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Nos. 80-1012, 80-1030, and 80-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, Petitioner;

BOHEMIAN DISTRIBUTING COMPANY, Petitioner;

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al., Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
THIRD APPELLATE DISTRICT,
OF THE STATE OF CALIFORNIA

BRIEF OF PETITIONER BOHEMIAN DISTRIBUTING COMPANY

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QUESTIONS PRESENTED

Assembly Bill 499, California's primary source law, provides that only licensed liquor importers designated by brand owners may purchase or accept delivery of such brands in California.

1. Does Assembly Bill 499 conflict with the Sherman Act, even though it does not require any person to engage in conduct that would violate the Sherman Act?

2. Does section 2 of the Twenty-first Amendment, which grants to the states the right to control importation and sale of liquor and to structure its distribution system, authorize California to enact and enforce a primary source law?

PARTIES

The parties to the proceeding, in addition to petitioner, a California corporation and an intervenor below, are:

1. Baxter Rice, Director, Department of Alcoholic Beverage Control.

2. Wine & Spirits Wholesalers of California, a California corporation, another intervenor below.

3. Norman Williams Company, a California corporation; Schwab Distributing Company, Inc., a California corporation doing business as Gold Coast Wines & Spirits; Lewis-Westco & Co., a California corporation; Frederica Auldridge, doing business as South Bay Liquor; Green Cat Liquors, Inc., a California corporation; Ralph E. Pierce and Sharon L. Pierce, doing business as Texas Liquor House; and William Kirby, Jr. and Shirley D. Kirby, doing business as House of Fine Spirits.

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BRIEF OF PETITIONER BOHEMIAN DISTRIBUTING COMPANY

OPINIONS BELOW

The opinion of the Court of Appeal (Pet. App. 1a-15a)[1] is reported at 108 Cal.App.3d 348, 166 Cal.Rptr. 563.

JURISDICTION

The judgment of the Court of Appeal was entered on July 17, 1980. On September 24, 1980, the Supreme Court of California denied a timely petition for hearing (Pet. App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1976).

[1] "Pet. App." refers to the appendix to the petition in this case, No. 80-1030.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Twenty-first Amendment to the Constitution, section 2, provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

2. The Sherman Act, section 1, 15 U.S.C. § 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

3. The Sherman Act, section 2, 15 U.S.C. § 2, provides in part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . .

4. Cal. Bus. & Prof. Code § 23672 ("A.B. 499") provides in part:

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse for the account of such licensed importer . . . before sale and delivery to a retail licensee.

5. Other pertinent portions of the California Business and Professions Code are set forth at Pet. App. 19a-23a. Pertinent portions of the Oklahoma Statutes (Okla. Stat. Ann. tit. 37, § 501 *et seq.* (West Supp. 1981)) are set forth in Pet. App. 24a-25a.

STATEMENT

California has enacted a comprehensive statutory scheme which regulates the importation and distribution of liquor in California. Cal. Bus. & Prof. Code § 23000 *et seq.* (West 1964 & Supp. 1980). This scheme establishes a three-tier system of liquor distribution: retailing, wholesaling (including importing), and manufacturing (*e.g.* distilling). A license is required for each activity, and no one may hold a license to engage in activity at more than one tier. Cal. Bus. & Prof. Code § 23772 (West 1964).

One part of the California system of distribution is a "primary source" statute. Such a statute provides that a wholesaler may import liquor into the state only if it is authorized ("designated") by the distiller to do so. A primary source rule has been part of California's liquor distribution laws since 1973. *See* Cal. Bus. & Prof. Code § 23672 (West Supp. 1980) (reprinted at Pet. App. 22a). A primary source statute gives the distiller (or the owner of the brand) control of the structure of distribution: as examples, the distiller may designate one, two or many wholesalers for each brand; he may designate one wholesaler for one of his brands and a different wholesaler for others; and he may restrict the designation to sales in given metropolitan areas. Primary source laws are common to state systems of liquor regulation.[2]

The statute challenged in this litigation, A.B. 499, is a primary source law. It replaced the earlier California primary source law as a result of litigation with which the Court is familiar. *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 579 P.2d 476 (1978), invalidated Cal. Bus. & Prof. Code § 24755 (reprinted in Pet. App. 19a-22a) on the ground

[2] The primary source laws of other states are collected at Pet. App. 37a-38a. The following statutes cited at Pet. App. 37a-38a have been amended: H.B. 1271, 1981 Colo. Sess. Laws 157 (CCH) (to be codified as Colo. Rev. Stat. § 12-47-128(3)), P.A. 81-294, 1981 Conn. Pub. Acts 766 (to be codified as Conn. Gen. Stat. Ann. § 30-63); P.A. 82-480, 1981 Ill. Laws 2138; and P.A. 82-606, 1981 Ill. Laws 2796 (to be codified as Ill. Stat. ch. 43, § 126 (Smith-Hurd)).

that the system of resale price maintenance it established for the distribution of liquor conflicted with the Sherman Act. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) *("Midcal")*, this Court agreed, substantially relying on *Rice*.

The primary source statute then in effect, Cal. Bus. & Prof. Code § 23672, referred to the invalid section 24755 by defining as an "authorized importer" any person designated by the "licensee who filed the *minimum retail price schedule* for such brand pursuant to Section 24755." (emphasis added). Following the decision in *Rice*, California's Department of Alcoholic Beverage Control concluded that it could no longer enforce the primary source statute in light of the nature of this reference to section 24755.

A system of vertical allocation need not be a creature of statute. Ordinarily a distiller may sell to whom it pleases, subject to the state's licensing requirements, and this ability to select customers may be all that is necessary to replicate the effects of a primary source law. This system of private choice does not always prevail in the liquor business, however, because some states have "open wholesaling" systems, under which a distiller who sells to anyone must sell to everyone. If an open wholesaling state also permits free export of liquor, the distiller's ability to select its customers in other states is undercut as well.

Oklahoma has both open wholesaling and free export statutes.[3] An Oklahoma wholesaler may sell spirits out of the state to "qualified persons." (Okla. Stat. Ann. tit. 37, § 521(e) (West. Supp. 1981) (reprinted at Pet. App. 24a). Liquor shipped into Oklahoma thus could be reshipped to California so

[3] Oklahoma's open wholesaling statute is Okla. Stat. Ann. tit. 37, § 533 (West Supp. 1981), reprinted at Pet. App. 24a-25a. The Attorney General of Oklahoma has ruled that distillers nonetheless are free to fill or not fill purchase orders for liquor to be delivered to destinations outside of Oklahoma. A state court has disagreed with this opinion and entered an order under which all attempts to control resales or to cease selling to any wholesaler are unlawful. *Central Liquor Co. v. Oklahoma Alcoholic Beverage Control Board*, No. CJ-81-1413 (D. Ct. Okla. Cty. Aug. 11, 1981), appeal pending. A copy of the opinion of the Oklahoma trial court has been lodged with the Clerk of this Court.

long as the recipient were "qualified." And the holding of *Rice,* coupled with the position of California's Alcoholic Beverage Control authorities that the existing primary source statute could not be enforced, made all California wholesalers of *any* brand "qualified" to buy *every* brand; each wholesaler had a state license to be a wholesaler. Certain wholesalers, including respondent Norman Williams Company, took advantage of this and began to purchase spirits that distillers were unwilling to sell to them directly.

To restore the system it desired, under which only certain designated importers have the right to distribute liquor into California, the California legislature in 1979 adopted A.B. 499. The statute is designed principally to nullify the extraterritorial effect of Oklahoma's law on California's liquor distribution system.

Prior to the effective date of A.B. 499, Norman Williams Company filed a petition for a writ of mandate in the Court of Appeal, Third Appellate District, seeking an order directing Rice, the Director of the Department of Alcholic Beverage Control, to refrain from enforcing A.B. 499. The petition argued, among other things, that A.B. 499 conflicts with and is preempted by the Sherman Act.

The Court of Appeal issued an alternative writ of mandate on December 31, 1979, preventing Rice from enforcing A.B. 499 pending further order of the court. As a result, A.B. 499 has never gone into effect. On July 17, 1980, the Court of Appeal held that A.B. 499 is invalid because it conflicts with and is preempted by the Sherman Act (Pet. App. 1a-15a). The court based its holding solely on the facial terms of the statute; it declined to consider evidentiary material prepared by Norman Williams Company (*id.* at 2a, n.1).

The court below based its decision on two premises: (1) the Sherman Act forecloses state laws that enable or aid any restraint on intra-brand competition; and (2) any restraint on intra-brand competition violates the Sherman Act. *See* Pet. App. 8a-10a. The court thought this conclusion was mandated

by *Midcal.* It also rejected an argument that the Twenty-first Amendment authorizes states to enact statutes that otherwise would be preempted by the Sherman Act (*id.* at 11a-15a).

SUMMARY OF ARGUMENT

1. The court below employed two false premises. The first is that the Sherman Act overrides all state laws that restrain intra-brand competition. That notion, which would preclude enforcement of state contract and tort law, as well as trade secret law, was treated as frivolous in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11 (1978). The second is that restraints on intra-brand competition necessarily undermine the policies embodied in the Sherman Act. That notion was put to rest in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which held not only that the Sherman Act does not forbid all restraints on intra-brand competition but also that some restraints on intra-brand competition foster interbrand competition, "the primary concern of antitrust law," and thus are beneficial to competition.

2. In any case, A.B. 499 does not conflict with the Sherman Act because the contracts it authorizes are subject to the same Sherman Act scrutiny as any other contracts for any other products. This is so because A.B. 499 does not compel distillers and wholesalers to reach any particular territorial contracts. If such contracts are made, they will be voluntary and therefore outside the zone of implied immunity of *Parker v. Brown*, 317 U.S. 341 (1943). This case therefore differs from *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), where resale price maintenance agreements — *per se* violations of the Sherman Act — were promoted by state law without any state scrutiny.

3. Even if it otherwise would conflict with the Sherman Act, A.B. 499 is within the scope of the power granted to the states by the Twenty-first Amendment. The statute counteracts, within California, the extraterritorial effects of Oklahoma's use of its own Twenty-first Amendment powers. The Oklahoma

open-wholesaling law otherwise has the effect of precluding a distiller from entering into a territorial allocation contract with its customers located in California. The Oklahoma customers are free to order liquor for delivery in Oklahoma and have it rerouted to California. The Oklahoma law therefore creates in California the "free rider" effect, which, as this Court observed in *Sylvania,* is a market imperfection preventing merchants from supplying promotional and repair services that would be provided if the merchants could be protected from intra-brand competition by vertical contracts. Thus, A.B. 499, by allowing California's liquor trade to benefit from vertical allocations from which any other product in California can benefit (but from which liquor trade cannot so long as open-wholesaling laws prevail), enhances interbrand competition.

ARGUMENT

I. A.B. 499 DOES NOT CONFLICT WITH THE SHERMAN ACT

There are two distinct inquiries to be made in deciding whether A.B. 499 is preempted by the Sherman Act. The first concerns the standard for measuring conflicts between state and federal law. The second concerns the content of the two laws. These inquiries are addressed in turn below.

A. In preemption cases a court should not seek out conflicts with state law

"[W]hen a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978), quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Unless Congress has explicitly foreclosed all state legislation in a particular area — and it plainly has not done so in the area of competitive policy—a state statute is void only to the extent it actually conflicts with a valid federal statute. *Id.* at 158. A conflict will

be found only where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963) quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). This Court in *Florida Lime* stated that a state law will stand where there is no "actual conflict between the two schemes of regulations [such] that both cannot stand in the same area." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963).

This Court's cases, of which *Parker v. Brown,* 317 U.S. 341 (1943), and its progeny are good examples, establish that states may establish their own principles of competition and regulation without offending federal antitrust principles. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), is an especially compelling illustration. This Court upheld the validity of a Maryland statute which provided that a producer or refiner of petroleum products (1) may not operate any retail service station within the state, and (2) must extend voluntary price reduction uniformly to service stations it supplies. The parties contended that the law was preempted by the federal policy favoring competition. The Court disagreed, pointing out that "[i]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" 437 U.S. at 130, quoting *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 45 (1966). It did not matter, the Court said, that Maryland's law might retard competition: "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Id.* at 133 (footnote omitted).

Seagram, on which the Court relied, also involved the interplay of antitrust and state regulation. It involved a challenge of the validity of New York's statutes requiring liquor brand owners to file price schedules with an affirmation that the prices were no higher than the lowest price at which sales were

made anywhere in the United States. Plaintiffs sought an injunction on the ground that the provisions conflicted with the Sherman Act. The Court disagreed, pointing out that the state's statutes did not compel anyone to disregard antitrust principles.

The Court further explained that although it was possible to envision circumstances under which a violation of antitrust law could be compelled under the New York statutes, "the existence of potential conflicts is entirely too speculative to be a basis for preemption." *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 46 (1966).

B. The court below erred by finding a conflict where none exists

The court below failed to heed this Court's rule of caution in preemption cases. Instead, it sought out and thought it found conflict, where in fact none exists. The basis of the court's error is revealed in its rationale (Pet. App. 8a-9a):

> The designation statute gives brand owners the unfettered power to restrain competition...by merely deciding who may and who may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller. . . . The statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturer to forbid others to sell to a disfavored importer. . . . [W]e are concerned with the state-provided authority to prevent trade among others. . . . Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act.

This passage contains the premises that explain why the court found a conflict between the Sherman Act and A.B. 499: (1) the Sherman Act forecloses state law solely because the state law aids in restraining intra-brand competition; (2) restraints on intra-brand competition necessarily undermine the policies of the Sherman Act. Both premises, as the

following discussion shows, are false and these false premises led the court to a result that, as the Solicitor General aptly observed, "is plainly incorrect" (U.S. Br. 8).

1. The Sherman Act does not preempt state laws just because those laws facilitate restraints on intra-brand competition

It is too plain for argument, in light of the Court's precedents on preemption, that states may enact statutes affecting the process of intra-brand competition. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11 (1978), the Court treated as frivolous an argument that a California statute was preempted by the Sherman Act because it "permits auto dealers to invoke state power for the purpose of restraining intra-brand competition." In this case the arguments supporting the state's statute are even more powerful than they were in *Fox*.

a. Federal law protects competition, not competitors

We start from the premise that there is no conflict between state and federal law just because state law may put some wholesalers at a disadvantage. Federal antitrust law protects the process of competition, not the welfare of particular competitors. See, *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). The desire of respondent Norman Williams Company and similarly situated firms to profit from selling liquor plays no role in antitrust analysis. *Sylvania, supra*, 433 U.S. at 52 & n.21.

Many state laws harm particular firms but promote the process of competition. For example, state laws concerning trade secrets and business torts may place some firms in positions of advantage relative to others, but these state laws are desirable complements to federal policy. They enable inventors and other entrepreneurs to reap the rewards of their

efforts and so increase the welfare of consumers over the long run. See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). Similarly, state statutes may assist the competitive process by enabling firms to control the process by which their products are distributed.

b. Restrictions on distribution promote competition in "soft" product attributes and thus further federal policy

The Court held in *Sylvania* that territorial restrictions on distribution of a product may promote competition. As the Solicitor General observed (U.S. Br. 8, 15-18), this fact should be the end of this case. The state's statute—which facilitates territorial restrictions and other vertical arrangements concerning distribution — cannot be preempted unless all forms of restricted distribution are anticompetitive. Yet *Sylvania* establishes that many forms of restricted distribution are procompetitive. If exclusivity is beneficial or even competitively neutral, then the state court's point — that California provides distillers with a way to *enforce* their decisions concerning distribution, despite the open wholesaling laws of Oklahoma — offers praise of the statute, not condemnation.

As the Court stressed in *Sylvania*, territorial and related restrictions facilitate competition in product attributes that manufacturers cannot control at the factory.[4] Distillers can control directly the flavor, alcohol content, and packaging of their products, but they must induce others (wholesalers and retailers) to provide that collection of additional attributes, such as courteous service, knowledgeable personnel, prompt availability of brands, and so on, that consumers value.

[4] *Sylvania* involved location clauses rather than exclusive territories or other restraints, but the Court treated them as equivalent. 433 U.S. at 45-47.

The Court recognized, as scholars have discussed,[5] that any attempt to induce dealers to provide the services directly produces intractable problems of monitoring, while indirect methods, such as pointing out what consumers want, fall prey to "free riding." If one wholesaler provides the necessary services, retailers or customers can take advantage of the advice and full stocks on some occasions but divert ordinary purchases to other wholesalers; these others will attract business by offering lower prices, which they can do because they do not bear the costs of providing the services in question. Free riding by dealers is, in effect, a selective tax on what we here for convenience call the "soft" product (dealer-provided) attributes; it leads to too little service, as customers see things. They would like to obtain the services, even at a cost, but they cannot because dealers, afflicted by the "tax," produce less.

Territorial, customer, and other restrictions attack free riding by reducing the ability of customers to go to one dealer for costly services while directing the bulk of their purchases elsewhere. The restrictions reduce the size of the free riding tax. As a result, dealers will provide that mix of "hard" (manufacturer-provided) and "soft" attributes that customers value most. This is beneficial to everyone.

There is simply no reason to think that manufacturer-controlled territorial or other like vertical restrictions can harm competition. As distillers see things, the difference between the price they get from wholesalers, and the price wholesalers get from retailers, is the "cost of wholesaling." Distillers want this cost of wholesaling to be as small as possible, consistent with the provision of the "soft" services consumers value. The costs distillers incur in furnishing these services are no different in

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[5] *See, e.g.*, the work of Judges Bork and Posner. R. Bork, *The Antitrust Paradox* 288-98, 430-34 (1978); Bork, *Vertical Restraints: Schwinn Overruled*, 1977 Sup. Ct. Rev. 171; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 18-22 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977). *See also, e.g.*, Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?*, 67 Va. L. Rev. 1457 (1981).

principle from the costs distillers incur in improving the flavor or packaging of a brand. Distillers are not interested in wasting their money, and they would no more establish a system of distribution that furnished excessively-costly services than they would design excessively-costly bottles; the excess cost picks the distillers' pockets. In every case, the distiller's interests are congruent with those of the consumer. Courts do not attempt to determine whether liquor bottles are too ornate; similarly, there is no need for them to determine whether manufacturers have designated too few wholesalers in a given location.[6]

The value of "soft" product attributes is apparent in the spirits business. Customers value knowledgeable salesmen, convenient and comprehensive stocks, and so on. Limits on the number of distributors in a given territory enable wholesalers to provide these services without fear that customers, having obtained the services from one vendor, will place the bulk of their orders elsewhere.

Restrictions on distribution also contribute to the introduction and promotion of new brands. If many wholesalers handle a given brand in the same territory, no one wholesaler has adequate incentives to promote that brand. If he promotes the brand — perhaps by advertising, or perhaps by placing it at a discount in bars — he has no assurance that he will make the sales that the promotion generates. Other wholesalers who did no promotion are likely to obtain some share of the new sales. Thus multiple distributors have an incentive to be passive, each hoping to obtain a free ride on the efforts of the others. As a result, there will be less new brand introduction and promotion than consumers would prefer.

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[6] This would hold true even if there were no competition among distillers. A monopolist, no less than a competitive firm, strives to design products consumers prefer. The monopolist gains by being able to set a monopoly price for the most-desired bundle of attributes. But the Court need not adopt this position in order to sustain California's statute. Here, it is undisputed that there are many distillers in the market.

The benefits available to consumers from enhanced competition in the provision of "soft" product attributes *are caused by* the restrictions manufacturers place on their dealers. Nothing in *Sylvania* hints that the ability of distributors to procure products against the manufacturers' wishes in order to evade territorial exclusivity is some sort of "safety valve" necessary to make exclusive territories lawful. Far from it. To the extent the manufacturer is unable to enforce exclusivity the benefits of the practice disappear. Thus the critical step in the Court of Appeal's reasoning — that *enforced* exclusivity must be unlawful *per se* to the extent enforcement is effective — contradicts the rationale of *Sylvania.* The Solicitor General has made the critical point in observing that the state's "enforcement of such restraints through a designation statute would in those circumstances further rather than conflict with federal antitrust policy" (U.S. Br. 17 n.14).[7]

In most businesses, a legal rule banning restricted distribution practices would simply increase the incentives of the manufacturer to enter the distribution business itself. What it did with its wholly-owned outlets would be of no antitrust concern. This has led several courts to adopt a legal rule that restricted distribution practices are lawful at least whenever the manufacturer could have entered the distribution business internally or by merger-that is, almost always. See, *e.g., Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981), *cert. denied sub nom, Red Diamond Supply, Inc. v. Acme Welding,* 50 U.S.L.W. 3246 (U.S. October 6, 1981) (No. 80-1987)[8]. Under such an approach restricted distribution is lawful *per se* in all but name, and A.B. 499 is

[7] By "in those circumstances" the Solicitor General evidently meant all circumstances in which vertical restrictions on distribution would be beneficial if procured by the manufacturer regardless of the state's actions. The brief thus makes the point that if the underlying vertical restraint is desirable, the state's willingness to enforce the private decision cannot be undesirable.

[8] See also *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292 (5th Cir. 1981) (unless the manufacturer has substantial market power, any restricted distribution arrangement is lawful); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981), *cert. denied* 50 U.S.L.W. 3246 (U.S. October 6, 1981) (No. 80-2080) (exclusive territories are not unlawful when employed by manufacturers with small market shares).

lawful as applied to all brands and all distributors. This is the appropriate treatment of the subject, we submit, a treatment covered in exhaustive detail in the writings of Judges Bork and Posner. *See* note 5, *supra.*

2. At all events, A.B. 499 does not purport to immunize any unlawful restricted distribution practices and thus cannot offend federal statutes

If the Court agrees with petitioner's argument so far, it can remand with instructions that the Court of Appeal enter a judgment declaring A.B. 499 to be consistent with the Sherman Act. And even if the Court does not agree with the position that restricted distribution agreements are uniformly consistent with the Sherman Act (at least when initiated by manufacturers), it would not follow that A.B. 499 is open to challenge. To the contrary, because A.B. 499 does not *authorize* any particular restrictions, but only provides that restrictions desired by brand owners will be enforced, it does not conflict with the Sherman Act in any manner.

The manufacturer or brand owner has complete discretion under A.B. 499 to designate as many or as few wholesalers, per brand or by territory, as it pleases. The statute does not endorse or promote any particular pattern of designation; it simply enforces the manufacturer's choice. The manufacturer thus remains fully liable for its own choice, as the Solicitor General emphasized (U.S. Br. 12-14), and as *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 (1976), holds.

Because the statute does not purport to compel any conduct or confer any immunity, it cannot be inconsistent with the Sherman Act. If a given restricted distribution arrangement would be lawful, and the statute enforces that arrangement, there is no problem because there is no substantive violation. And if a given distribution arrangement would be unlawful, there is still no need to consider preemption of the statute, because the manufacturer's designation may be attacked directly under federal law.

3. The Court's decision in *Midcal* does not justify the order invalidating A.B. 499

The Court of Appeal thought this Court's decision in *Midcal* compels a judgment that A.B. 499 is preempted. It does not. *Midcal* involved a system of resale price maintenance, which the Court held to be unlawful *per se* as a matter of antitrust policy and to be outside the ambit of *Parker v. Brown.* The statute at issue in *Midcal* compelled firms to employ resale price maintenance but did not govern the prices to be charged. The Court saw the statute as a bare attempt by California to authorize private parties to violate the Sherman Act.[9]

A.B. 499 is altogether different. It does not authorize any violation. It simply enforces a system of distribution to be designed by the brand owners. If the brand owners' designations are lawful under *Sylvania,* then the state's enforcement is lawful too. See *Grant-Billingsley Liquor Co.* v. *Lennen,* 449 U.S. 943 (1980), dismissing for want of a substantial federal question an appeal from *Colby Distributing Co. v. Lennen,* 227 Kan. 179, 606 P.2d 102 (1980), a case that upheld the Kansas system of territorial allocation.

II. THE DECISION OF THE COURT BELOW DENIES CITIZENS OF CALIFORNIA THEIR TWENTY-FIRST AMENDMENT RIGHT TO ADOPT LEGISLATION TO PROMOTE COMPETITION AMONG DIFFERENT BRANDS OF LIQUOR IN CALIFORNIA

The decision of the court below is wrong for another reason. It deprives California of its Twenty-first Amendment right to enact legislation controlling the importation and dis-

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[9] Primary source laws are not related to resale price maintenance laws. Some jurisdictions, such as the District of Columbia (D.C. Alco. Bev. Control Bd. Regulations, tit. 3, ch. 1 § 4.11 (1980)) and Texas (Tex. Alco. Bev. Code Ann. § 37.10 (Vernon 1978)), have long had primary source laws and no resale price maintenance laws. Other jurisdictions, such as Massachusetts (Mass. Gen. Laws Ann. ch. 138, § 25B, 25C (West 1974 & Supp. 1979)), had resale price maintenance laws but no primary source laws. A comparison of primary source laws and resale price maintenance laws is set forth in tabular form in Wine and Spirit Wholesalers of America, Inc. 1976-1979 Cumulative Supplement to the Three-Tier System of Distribution in the Wine and Spirit Industry (November 1979).

tribution of liquor. Indeed, it deprives California of the right to enact a law that promotes competition between different brands of liquor in California.

This Court has said that "[c]onsideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment . . . ." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 41-42 (1966), and that the Twenty-first Amendment confers on each state the power to prohibit entirely or to limit and regulate the traffic in intoxicating liquors within the state. *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In *Midcal* the Court explained (*id.* at 110):

> There is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.

Pursuant to the power granted by the Twenty-first Amendment, California has enacted a comprehensive statutory scheme. Every aspect of the business is regulated (and taxed). The statutory scheme establishes a three-tier system of liquor distribution in California, similar to that of other states. A specific license is required for each activity; no one may hold a license to engage in activity at more than one tier. Cal. Bus. & Prof. Code § 23772 (West Supp. 1980). A.B. 499, the statute whose validity was placed in question by the lower court, is an important part of this scheme.

A designation or primary source law such as A.B. 499 permits the distiller and its customers to allocate sales territories. Whether the particular statute provides that the brand owner designate its wholesaler, and only that wholesaler can receive or purchase brand liquor (as in California) or that a supplier may not sell to a wholesaler unless it is the primary source of supply of the brand (as in Arizona), the effect is to

give the brand owner the ability to enforce contracts calling for vertical nonprice restrictions on dealers. *See* Ariz. Rev. Stat. Ann. § 4-243.01A (West 1981). Without such a statute, a purchaser in an open wholesaling state may route its purchases to California and nullify the contracts between the brand owner and its California wholesalers. The ordinary self-help remedy — terminating sales of offending dealers — is wiped out by the acts of the open wholesaling state. As the Solicitor General remarked (U.S. Br. 16-17), the California statute "cancels out the effect of Oklahoma law by restoring to a distiller or brand owner the power that Oklahoma law had taken away: the power to impose territorial restraints in California. . . ."

Without the shield of a primary source law, liquor would become the only article of commerce that may not be the subject of effective vertical territorial contracts. It was therefore reasonable for California to adopt a measure to secure, for its liquor consumers, the same benefits of competition from vertical territorial contracts that California consumers can receive for all other articles of commerce.

Any other conclusion would yield the anomalous result that the Twenty-first Amendment, by giving Oklahoma power to have an open wholesaling law, interfered with the right of California to enforce for liquor contracts what it could enforce for any other products. Whatever the outer reach of state power under the Twenty-first Amendment, it is surely broad enough to countervail the extraterritorial effects of another state's exercise of power under the same amendment.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted.

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Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, etc., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

BRIEF OF PETITIONER WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN CASE NO. 80-1052

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Questions Presented for Review.

This case presents for review the following questions relating to the validity of a California statute (CAL. BUS. & PROF. CODE § 23672 (West 1981)) which limits the persons who may purchase or accept delivery of a brand of distilled spirits to those licensed importers who have been designated by the brand owner or his agent:

1. Whether the California statute, *on its face*, compels or authorizes a *per se* violation of the Sherman Act and is therefore preempted under the Supremacy Clause even though the statute does no more than facilitate a brand owner's vertical allocation of the California wholesale market for branded distilled spirits;

2. Whether the Twenty-first Amendment to the United States Constitution validates the California statute and precludes its preemption by the Sherman Act and the Commerce Clause;

3. Whether in determining the validity, under the Sherman Act, of a state statute concededly enacted to effectuate a clearly articulated state policy, the state action exemption may be held inapplicable notwithstanding that the statute has not become effective and the state has not been afforded an opportunity to actively supervise the statutory scheme; and

4. Whether the Commerce Clause preempts the California Statute even though it does not discriminate against interstate commerce and there is no evidence that it will burden or unduly restrict the overall flow of interstate commerce.

Parties.

Petitioners herein are:

1. Baxter Rice, Director, Department of Alcoholic Beverage Control, respondent below;

2. Wine & Spirits Wholesalers of California, a California corporation, an intervenor below; and

3. Bohemian Distributing Company, a California corporation, an intervenor below.

Respondents herein, petitioners below, are Norman Williams Company, a California corporation; Schwab Distributing Company, Inc., a California corporation d/b/a/ Gold Coast Wines & Spirits; Lewis Westco & Co., a California corporation; Greene Cat Liquors, Inc., a California corporation; Frederica Auldridge d/b/a South Bay Liquor; Ralph E. Pierce and Sharon L. Pierce d/b/a/ Texas Liquor House; and William A. Kirby, Jr. and Shirley D. Kirby d/b/a/ House of Fine Spirits.

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Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, etc., *et al.*,

Respondents.

BRIEF OF PETITIONER WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN CASE NO. 80-1052.

Opinion Below.

The Opinion of the California Court of Appeal, Third Appellate District, is officially reported as *Norman Williams Co. v. Rice,* 108 Cal. App. 3d 348 (1980). (P.A. *A* 1-17.)[1]

Jurisdiction.

The judgment of the California Court of Appeal was entered on July 17, 1980 and is set forth in that court's Opinion. (P.A. *A* 16-17.) A timely Petition for Hearing, filed by Wine & Spirits Wholesalers Association of Cali-

[1]The Appendices to Petition No. 80-1052 are cited in this Brief as "P.A." and the Joint Appendix filed herein is cited as "J.A." Record documents which are not contained in an appendix are cited as "R." with a description of the document.

fornia in the California Supreme Court, was denied by that court on September 24, 1980. (P.A. *B* 18.)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions.

This case involves the following constitutional and statutory provisions, which provide in relevant part:

U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . .

U.S. CONST. art. VI, cl. 2 (Supremacy Clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstandng.

U.S. CONST., amend. XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sherman Act § 1, 15 U.S.C. § 1 (1981):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

CAL. BUS. & PROF. CODE § 23672 (West 1981), as amended by Assembly Bill No. 499 (Stats. 1979, ch. 208, § 1):

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is

> designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee.

Pertinent provisions of Oklahoma law are quoted in the Appendices to Petition No. 80-1052. (P.A. *C* 19-20.)

Statement.

This case was maintained by petitioners below as an original writ proceeding in the California Court of Appeal, Third Appellate District, to adjudicate the validity of California Business & Professions Code section 23672 (West 1981), as amended by Assembly Bill No. 499 (Cal. Stats. 1979, ch. 208, § 1) (the "Designation Statute"). In pertinent part, the Designation Statute, as amended, provides:

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent.[2]

Petitioners below are three California importer-wholesalers[3] of distilled spirits and four of their retail customers. Respondent below is Baxter Rice, Director of the California Department of Alcoholic Beverage Control. Wine & Spirits Wholesalers of California ("Wholesalers Association"), a statewide association of licensed importers and wholesalers of distilled spirits, and Bohemian Distributing Company, a California importer-wholesaler, were granted leave to in-

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[2]The validity of the last sentence of the Designation Statute, which requires that imported distilled spirits "come to rest" at the importer's warehouse, was not challenged by petitioners below and is not an issue in this case. (P.A. *A* 16.)

[3]Pursuant to California Business & Professions Code section 23775 (West 1964), a licensed importer must also hold a California wholesaler's license.

tervene for purposes of defending against claims asserted by petitioners below. (J.A. 2.)

By an amended petition for writ of mandate filed on November 20, 1979, petitioners below alleged, among other things, that the Designation Statute "is inconsistent with and preempted by the Federal antitrust laws. . . ." Petitioners below expressly limited their challenge to the validity of the Statute on its face and disclaimed the necessity of a trial on the facts. (J.A 25.) On December 31, 1979, one day prior to the effective date of Assembly Bill No. 499, the California Court of Appeal issued an alternative writ and stayed the enforcement of the Designation Statute, pending resolution of the case on its merits. (J.A. 74-77.) The court ultimately struck down the statute, resting its final decision exclusively on federal grounds. In its Opinion, the Court of Appeal ruled that the Designation Statute was invalid because it purportedly was in "direct contravention of the express terms of the Commerce Clause and the Sherman Act."[4] (P.A. *A* 10.) Consistently with the issues framed by the Amended Petition, the lower court based its determination solely on the facial validity of the Designation Statute and declined to consider any evidentiary material presented by petitioners below. (P.A. *A* 2 n.1.)

A timely Petition for Hearing filed in the California Supreme Court was denied without opinion on September 24, 1980. (P.A. *B* 18.) On the following day, the Court of Appeal issued a peremptory writ of mandate permanently enjoining enforcement of the Designation Statute. (P.A. *D* 21.)

The Designation Statute is an integral part of California's Alcoholic Beverage Control Act. (J.A. 52.) Originally enacted in 1933, when the Eighteenth Amendment to the

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[4]In proceedings before the Court of Appeal, the parties did not address the question whether the Commerce Clause invalidated the Designation Statute. The issue was raised *sua sponte* by the court in its opinion.

United States Constitution was repealed, the Act is a comprehensive statutory scheme for regulating the importation, distribution and sale of distilled spirits. *See* CAL. BUS. & PROF. CODE § 23000 *et seq.* (West 1964); *Sandelin v. Collins*, 1 Cal. 2d 147, 152, 33 P.2d 1009 (1934). The vast majority of distilled spirits consumed in California is imported from sources outside the State, and the great bulk of imported distilled spirits consists of brands owned by distillers and other primary sources of supply. (*See* J.A. 16; R. — Declaration of Sante Quattrin in Support of Application of Wine & Spirits Wholesalers of California for leave to Intervene and to File Complaint in Intervention ("Quattrin Declaration") at A-2, A-13, filed on Nov. 29, 1979. (J.A. 2.) Historically, California's system of liquor distribution and its entire regulatory scheme have been premised on a statutorily-mandated "three-tier" structure, consisting of the manufacturer tier (the brand owners and other primary suppliers, referred to herein for convenience as "brand owners"), the wholesaler tier (the importer-wholesalers) and the retailer tier (the retail outlets). *See* CAL. BUS. & PROF. CODE §25500 *et seq.* (West 1964); *see also California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. Control Appeals Bd.*, 5 Cal. 3d 402, 407, 412, 487 P.2d 745 (1971). Under this system brand owners were able, through private agreements, to designate specific importers as authorized distributors and preclude importation by others. Thus, liquor imported into California was purchased directly from brand owners. (*See* J.A. 57, 61, 91-92; R. Quattrin Declaration at A-7-8, A-12-13.)

In 1973, the California Legislature enacted the original Designation Statute (Cal. Stats. 1973, ch. 707, § 1) to preserve the State's traditional structure for importation and wholesale distribution of brand name liquor. (*See* R. Quattrin Declaration at A-5; *cf.* J.A. 62-63, 67.) The Statute was adopted because California was confronted with the prospect that its distribution system would be disrupted by

importations from other states to importer-wholesalers within the State who were not authorized by brand owners to handle their products. At the time of this enactment, both Minnesota and Oklahoma had laws which, in the absence of action by California, would have permitted exports of brand name liquor from those states to California importer-wholesalers, irrespective of whether the brand owner had selected them to market the brands. (*See* R. Quattrin Declaration at A-5-6; *cf.* J.A. 67.) This was possible because those States had "open wholesaling" systems of distribution whereby each wholesaler had a statutory right to purchase any brand of liquor from any brand owner who chose to market his brand in the State. MINN. STAT. ANN. § 340.114 (West 1972); 37 OKLA. STAT. tit. 37, § 533 (West 1958). In addition, the wholesaler was not prohibited from selling and exporting liquor to other states.[5] For example, Oklahoma law permits an Oklahoma wholesaler to order liquor from a distiller for delivery in Oklahoma and then either reroute the shipment to California while it is in transit or reship it to California after delivery in Oklahoma. (*See* J.A. 113-14.)[6]

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[5]While maintaining its open wholesaling law, Minnesota has eliminated the free export feature from its distribution system through the enactment in 1978 of an express prohibition on resale out-of-state without the manufacturer's permission. MINN. STAT. ANN. § 340.145 (West 1978). *See Dakota Wholesaler Liquor v. Minnesota*, 584 F.2d 847, 848 (8th Cir. 1978) (affirming the denial of a motion to enjoin enforcement of Minnesota's prohibition on such exports).

[6]All distillers marketing in Oklahoma must sell distilled spirits to any and all licensed Oklahoma wholesalers. OKLA. STAT. tit. 37, § 533 (West 1958). Distillers may not place a limit on quantity and are required to fill orders in the sequence received, at prices no higher than the prices charged to wholesalers in any other state. *Id.* §§ 533, 536.1; Regulations of the Oklahoma Beverage Control Board, art. 3, § 1(4)(e) and (h). (*See also* P.A.C 19-20.) Furthermore, Oklahoma wholesalers are expressly authorized to resell distilled spirits out-of-state to all "qualified persons." OKLA. STAT. tit. 37, § 521(e) (West 1958). (*See also* P.A.C 19-20.)

Despite the latter provision, the Attorney General of Oklahoma recently has ruled that distillers may enter into agreements with wholesalers binding them not to resell liquor to other wholesalers, including

As enacted in 1973, the Designation Statute was a law of general application, designed to protect California's liquor distribution system from erosion by imports of branded liquor, not authorized by the brand owner, from Minnesota, Oklahoma and other states. (*See* J.A. 63, 67.) To this end, the Statute prohibited a California importer from purchasing or accepting delivery of any branded distilled spirits unless designated as an authorized importer "*by the licensee who filed the minimum price schedule for such brand* pursuant to Business and Professions Code § 24755." (Cal.Stats. 1973, ch. 707, § 1 (emphasis added).) Under California Business and Professions Code section 24755, repealed in 1980, brand owners or their agents were required to file a minimum price schedule with the Department of Alcoholic Beverage Control in connection with the price maintenance feature of California's liquor fair trade laws.

In May 1978, the California Supreme Court, in *Rice v. Alcoholic Bev. Control Appeals Bd.*, 21 Cal. 3d 431, 579 P.2d 476 (1978), held that section 24755 was invalid because it was part of a statutory price-fixing scheme preempted by the Sherman Act. The validity of the Designation Statute was not questioned in the *Rice* case. Nevertheless, the California Department of Alcoholic Beverage Control took the position that the *Rice* decision rendered the Designation Statute unenforceable because there was no longer any licensee who was required to file a minimum price schedule. (*See* J.A. 90; R. Quattrin Declaration at A-10, A-14.)

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out-of-state wholesalers. A state court disagreed with this opinion and entered an order under which all attempts by distillers to control resales or to cease selling to any particular wholesaler are unlawful under Oklahoma law. *Central Liquor Co. v. Oklahoma Alcoholic Bev. Control Bd.*, No. CJ-81-1413 (D. Ct. Okla. Cty. Aug. 11, 1981), appeal pending. The reversal of this order would alleviate one of the problems which prompted California to enact the Designation Statute, but it would have no relevance to the legal issues presented in this case.

Thereafter, a number of nondesignated importers, including some of the petitioners below and certain Oklahoma wholesalers, moved to exploit the gap in the law resulting inadvertently from the decision in *Rice*. The Oklahoma wholesalers purchased leading brands of distilled spirits for resale to the nondesignated California importer-wholesalers. (J.A. 17, 112.) These arrangements, characterized as "the Oklahoma connection" by the California Court of Appeal (P.A. *A* 4), had the effect of materially disrupting California's historic system whereby branded distilled spirits were imported only from the brand owner.

In part for the purpose of eliminating this disruption of the California distribution system by the Oklahoma connection, the California Legislature in 1979 passed Assembly Bill No. 499, which amended the Designation Statute to delete the reference to California Business and Professions Code section 24755 and to provide, in substance, that a California importer shall not purchase or obtain a brand of distilled spirits "unless he is designated as an authorized importer" by the brand owner. In practical effect, the amended version of the Designation Statute is intended to continue the system prevailing under the original version, whereby imports of brand name liquor were channeled to distributors in California who were authorized by the brand owners to accept delivery of such brands. (*See e.g.*, J.A. 62-63, 67, 69.)

By reason of the Court of Appeal's stay of the enforcement of the Statute, issued *pendente lite* and followed ultimately by the issuance of a peremptory writ permanently enjoining the respondent below, Baxter Rice, from enforcing the Statute, the Designation Statute, as amended by Assembly Bill No. 499, never was permitted to take effect. (P.A. *D* 21.)

Summary of Argument.

A state enactment is not preempted by federal law unless the two regulatory schemes are in irreconcilable conflict. The California Court of Appeal clearly erred in concluding

that a conflict exists in this case on the face of the Designation Statute. The Statute does *not* conflict with the Sherman Act because the Statute neither compels nor authorizes conduct prohibited by the Act. The Statute merely facilitates the imposition by brand owners of vertical marketing arrangements, which this Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), held are not *per se* violations of the Sherman Act. As recognized by the Department of Justice in its Brief for the United States or Amicus Curiae ("United States Brief"), filed in this case, the purposes of the antitrust laws are served by recognizing that the Designation Statute does not immunize the conduct of private parties from antitrust scrutiny should they act to restrain trade unreasonably. (United States Brief at 13-14.)

Even if it were concluded that the Designation Statute does conflict with the Sherman Act, the Statute is validated by the Twenty-first Amendment because it falls within the State's "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Therefore, no balancing of competing federal and state interests is required or appropriate in this case, and the California Court of Appeal erred in embarking upon such an inquiry. Assuming, *arguendo*, that such an inquiry were warranted, the court below failed to strike the proper balance between federal and state interests because it misunderstood the nature of the federal interests involved and misconceived both the extent to which the federal interests may be impaired and the extent to which valid California interests are protected by the Designation Statute.

Assuming, *arguendo*, a conflict with the antitrust laws, the Court of Appeal also erred in holding that the Designation Statute does not fall within the state action exemption to the Sherman Act. It is not disputed that the Statute reflects a clearly articulated state policy. Accordingly, it was error

for the court below to invalidate the Statute because the State has not had an opportunity to exercise the degree of supervision necessary to satisfy the requirements set forth in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, for application of the exemption.

If it intended to rely on the Commerce Clause as an alternative ground for invalidating the Designation Statute, the court below clearly was wrong. The Statute does not, on its face, discriminate against or constitute an impermissible burden on interstate commerce. In addition, the Designation Statute falls squarely within the State's authority under the Twenty-first Amendment and therefore is unconfined by traditional Commerce Clause limitations.

ARGUMENT.

A. The Designation Statute Is Not Invalidated by the Sherman Act. In Reaching a Contrary Conclusion, the Court of Appeal Misapplied This Court's Decision in Continental T.V. v. GTE Sylvania.

1. A State Statute Is Not in Conflict With the Sherman Act Unless the State Enactment Compels or Sanctions Antitrust Violations by Private Parties.

There is a "strong policy against invalidating state regulatory schemes [on preemption grounds] in the absence of a clear showing of *irreconcilable conflict* with federal law. . . ." *Swift & Co., Inc. v. Wickham*, 364 F.2d 241, 246 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967) (emphasis added). "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.' " *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976), quoting *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). As this Court said in *Goldstein v. California*, 412 U.S. 546 (1973):

> We must . . . be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the State alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty." The Federalist No. 32, p. 243.

412 U.S. at 554-55 (emphasis in original).

The Court has consistently applied these principles in cases involving an alleged conflict between a state enactment and the federal antitrust laws. For example, in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the Court considered a Sherman Act challenge to a New

York price affirmation law which required brand name distillers to file monthly price schedules of liquor sales to wholesalers and retailers and affirm that the prices were no higher than the lowest prices at which sales were made anywhere else in the country during the preceding month. As a result of a series of stays issued by the lower courts, the affirmation law had not yet gone into effect at the time the case reached this Court, and therefore the Court was only concerned with the validity of the New York law *on its face* (*id.* at 41), which is precisely the posture of the present case.

On the issue of whether the state legislation conflicted with the antitrust laws, the Court in *Seagram* began with the premise that "[i]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' " *Id.* at 45, quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960). The Court then concluded:

> We find no such clear conflict in the present case. The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. Section 9 [the price affirmation provision of the New York enactment] imposes no *irresistible economic pressure* on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country.

384 U.S. at 45-46 (citations omitted) (emphasis added).

Although recognizing that it was possible "to envision circumstances under which price discriminations proscribed

by the Robinson-Patman Act might be compelled" by the New York price affirmation law, the *Seagram* Court held that "the existence of such potential conflicts is entirely too speculative in the present posture of this case" to foreclose New York from enforcing its price affirmation law. *Id.* at 46. Accordingly, the Court held that the state law, on its face, was constitutionally valid as against an antitrust attack. *Id.* at 52.

A conflict warranting preemption of a state law has been found by this Court only where the Court has determined that a state statute clearly purported to require or authorize a *per se* violation of the antitrust laws. Thus, in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*"), the Court struck down California's retail price maintenance and price posting statutes for the wine trade on the ground that the conduct required by the statutes "plainly constitutes resale price maintenance in violation of the Sherman Act." *Id.* at 103 (citations omitted). The Court in *Midcal* relied on *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), in which the state-enforced nonsigner provision of a Louisiana statute which sanctioned and enforced retail price maintenance was held *per se* violative of the Sherman Act.[7]

Schwegmann was distinguished in *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). In the latter case, plaintiffs challenged provisions of Cali-

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[7] *Midcal* and *Schwegmann* are the only cases in which this Court has invalidated a state law on the ground that it conflicted with the federal antitrust laws. The few lower court decisions in which a state law was invalidated on federal antitrust grounds also involved state-mandated price fixing schemes. *See Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971); *Rice v. Alcoholic Bev. Control Appeals Bd., supra*, 21 Cal. 3d 431, 579 P.2d 476 (1978); *Capiscean Corp. v. Alcoholic Bev. Control Appeals Bd.*, 87 Cal. App. 3d 996 (1979); *Mezzetti Assoc., Inc. v. State Liquor Authority*, 51 N.Y.2d 761, 411 N.E.2d 791 (1980) (opinion on reargument).

fornia's Automobile Franchise Act which required that a motor vehicle manufacturer secure the approval of the California New Motor Vehicle Board before opening a retail automotive dealership within a marketing area in the event an existing franchisee objected to the establishment of the new franchise. In concluding that the state law did not contravene the Sherman Act, the Court stated:

> Appellees' reliance upon *Schwegmann Bros. v. Calvert Distillers Corp., supra,* is misplaced. In *Schwegmann, the State attempted to authorize and immunize private conduct violative of the antitrust laws.* California has not done that here.

Id. at 110 (citations omitted) (emphasis added).

The Court emphasized that a good faith objection by an existing dealer would not violate the Sherman Act but warned that dealers submitting "sham protests . . . for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws." *Id.*

The principle which emerges from the cases is that a conflict between the federal antitrust laws and a state law does not arise unless the state law is found plainly to compel or sanction private conduct which violates the antitrust laws. *The mere possibility that private parties, purporting to act pursuant to the statute, may engage in conduct violative of the antitrust laws does not provide a basis for invalidating a state statute. See Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. at 45-46 (1966); *Colby Distributing Co., Inc. v. Lennen,* 227 Kan. 179, 606 P.2d 102, 110 (1980), *appeal dismissed sub nom. Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen,* 449 U.S. 943 (1980). A corollary to this rule is that at least in those situations where a state statute does not require an antitrust violation, private parties who violate the Sherman Act may not assert the state statute as a defense to suits brought against them

under the Act. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976). *See also Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408, 449-51 (S.D. Ohio 1980).

2. The Designation Statute Does Not Compel or Sanction an Antitrust Violation.

The issue in the present case is whether the Sherman Act necessarily proscribes a state-approved distribution system whereby manufacturers (brand owners) select the distributors for their products (importer-wholesalers) and the state makes the selection effective by precluding non-designated distributors within the state from purchasing the manufacturer's products from other out-of-state suppliers. In holding the Designation Statute invalid on its face, the court below reasoned that a statute which effectively authorizes private parties to prevent interstate commerce between other private parties "is in direct contravention of the express terms of . . . the Sherman Act." *Norman Williams Co. v. Rice*, 108 Cal. App. 3d 348, 358 (1980). The Court of Appeal in effect held that such conduct constitutes a *per se* violation of the Sherman Act. *See id.* at 356-58.

The California Court of Appeal's fundamental error was its failure to recognize that the essence of what is involved in this case is the legality under the antitrust laws of a brand owner's vertical allocation of the market for his product, which this Court held in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*"), does *not* constitute a *per se* violation of the Sherman Act. Instead, the legality of such marketing arrangements must be determined under the rule of reason—a test which the Court of Appeal did not apply and could not have applied on the

record below because the Statute, as amended, has not been allowed to operate.[8]

In reaching the result it did, the California Court of Appeal applied the same reasoning as this Court did in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) ("*Schwinn*"), which was overruled in *GTE Sylvania*. In *Schwinn*, the Court considered the legality of a franchising system whereby a manufacturer prohibited its designated distributors and retailers from selling to non-franchised retailers. Except for the facts that the distribution system in *Schwinn* operated at the retail level and was established by contract, the type of vertical arrangement under consideration in that case and its economic effect are directly analogous to the California liquor distribution system authorized by the Designation Statute.

The Court in *Schwinn* held that the vertical arrangements in question were *per se* illegal because "[u]nder the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." 388 U.S. at 379. *This is precisely the approach adopted by the Court of Appeal in the present case* in holding that the Designation Statute violates the Sherman Act solely because the Statute "allows the man-

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[8]Research has not disclosed a single case in which the rule of reason was applied to determine the validity of a state law, as distinguished from the legality of private conduct. See fn. 7, *supra*. Even if there were circumstances under which the validity of a state statute could be adjudicated under the rule of reason, the Designation Statute does not present such a situation. If a brand owner's selective designations create an unreasonable restraint on trade, he may be sued for violating the Sherman Act. The Designation Statute would not provide a defense because it does not purport to authorize an antitrust violation. (*See* discussion at pp. 21-22, *infra*.) It does not follow from the hypothetical possibility that private parties may violate the antitrust laws that the Designation Statute is invalid on its face. *Compare Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. at 45-46; *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. at 110.

ufacturer to forbid others to sell to a disfavored importer." *Norman Williams Co.*, 108 Cal. App. 3d at 357.

In *GTE Sylvania*, it was alleged that defendant Sylvania, a manufacturer of television sets, had violated the Sherman Act by including in its franchise agreements with retailers a prohibition against the sale of Sylvania products from other than specified locations. Relying on *Schwinn*, the trial court instructed the jury that any effort by Sylvania to restrict the outlets or store locations from which dealers could sell Sylvania merchandise after Sylvania parted with title to the goods was a violation of the Sherman Act, "regardless of the reasonableness of the location restrictions." 433 U.S. at 41. Judgment was entered against Sylvania. On certiorari, this Court reversed, flatly rejecting the inflexible approach of *Schwinn* in favor of a return to the rule of reason. The Court in *GTE Sylvania* concluded that *Schwinn* represented "an abrupt and a largely unexplained departure from *White Motor Co. v. United States*, 372 U.S. 253 (1963), where only four years earlier the Court refused to endorse a *per se* rule of illegality for vertical restrictions." 433 U.S. at 47.

The Court in *GTE Sylvania* recognized that vertical customer and territorial arrangements may have significant "redeeming virtues," such as promoting interbrand competition by enabling the manufacturer to achieve certain efficiencies in the distribution of his product.[9] *Id.* at 54. Because there had been no showing that vertical restrictions, either generally or of the type used by Sylvania, "have a 'pernicious effect on competition' or . . . 'lack . . . any redeeming virtue,' " the Court concluded that the "*per se*

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[9]The Court added that the fact that a particular restraint may not represent the least restrictive means of restraint available to a manufacturer does not make it any less proper a subject for review under the rule of reason. *Id.* at 58 n.29.

rule stated in *Schwinn* must be overruled.'"[10] *Id.* at 58 (citation and footnotes omitted).

The Court of Appeal in the present case failed to recognize that the case before it was functionally indistinguishable from *GTE Sylvania*. The court below stated:

> We find the decision in *Continental T.V. Inc. v. GTE Sylvania Inc.* to be inapposite to the statutory provision which we consider. That case involved a manufacturer's chosen method of product distribution enforced by refusal to sell to retailers outside of their assigned territories. Petitioners herein do not attack the decision of distillers to refuse to trade with them; rather, they attack the state-provided authority of the distillers to prevent them from trading with others. Nothing in *Continental T.V. Inc. v. GTE Sylvania Inc.* authorizes a state to delegate such power to a private party.

108 Cal. App. 3d at 357.

This passage shows that the court below simply did not understand *GTE Sylvania*. The issue addressed by this Court in that case (and in *Schwinn*) was the legality of a marketing arrangement *whereby the manufacturer prohibited downstream distributors or retailers who had acquired title to the manufacturer's merchandise from dealing with third parties*. In practical effect, no distinction can be made be-

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[10]Vertical marketing arrangements have also been held subject to the rule of reason in a variety of other circumstances. *See, e.g., White Motor Co. v. United States*, 372 U.S. 253 (1963) (Rule of reason held applicable to arrangement whereby truck manufacturer precluded its authorized dealers from selling to any federal or state government without the manufacturer's prior written consent); *General Bev. Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152-53 (7th Cir. 1978) (Rule of reason held applicable to wine manufacturer's territorial restriction barring distributors from selling to customers outside of the distributors' designated territories); *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) (Rule of reason held applicable to beer brewer's requirement that its wholesale distributors refrain from selling to persons outside of designated western states); *accord Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977).

tween the marketing impact of this type of arrangement and the vertical marketing arrangements authorized by the Designation Statute. If a brand owner contractually prohibited out-of-state wholesalers from *selling* to nondesignated California importers (assuming the other state's law did not preclude such arrangements), the legality of the arrangement under the Sherman Act would be determined under the rule of reason. No different rule can apply in determining the legality of vertical arrangements under the Designation Statute since the Statute achieves precisely the same economic result by forbidding nondesignated California importers from *buying* from out-of-state wholesalers.

As pointed out by the Department of Justice in its Brief for the United States as Amicus Curiae, filed in this case at the invitation of the Court, a primary purpose of the Designation Statute is simply to nullify in California the extraterritorial effect of an Oklahoma statutory scheme which disables brand owners from establishing vertical marketing arrangements by contract with Oklahoma wholesalers.[11] (United States Brief at 3-4, 17.) Oklahoma requires brand owners who wish to market their products in that State to sell to all Oklahoma wholesalers and permits Oklahoma wholesalers to sell to out-of-state buyers. This has led to sales by Oklahoma wholesalers to California wholesalers not selected by the brand owners, thus foisting Oklahoma's "open wholesaling" scheme onto California. As noted by the Department of Justice (United States Brief at 17), the Designation Statute merely severs the "Oklahoma connection" and thus reinstates the right of brand owners to choose their California distributors. The net effect is precisely the same as if neither the Oklahoma statutes nor the Designation

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[11]The Designation Statute also protects California's chosen system of liquor distribution against disruption should states other than Oklahoma and Minnesota adopt "open wholesaling" systems, or should wholesalers in other states violate contractual restrictions on resale to wholesalers who have not been designated by the brand owner.

Statute had been enacted, in which case brand owners would have been free to establish vertical allocations of the California wholesale market by entering into contracts with Oklahoma wholesalers (and others) precluding resales to nondesignated California wholesalers. The Court of Appeal failed to apply *GTE Sylvania* because it focused on the *manner* in which this vertical marketing arrangement is enforced (*i.e.*, by the State) rather than on the *economic effect* which it has in the California marketplace.

GTE Sylvania demonstrates that, even absent state involvement, vertical allocation of the market for a product is not a *per se* antitrust violation. *A fortiori*, California's endorsement of vertical marketing arrangements, by enactment of the Designation Statute, cannot conceivably be held to constitute a *per se* violation of the Sherman Act.[12] Indeed, as hereinafter discussed, pursuant to the Twenty-first Amendment and the state action exemption, the involvement of the state may legalize marketing arrangements for distilled spirits which would otherwise be prohibited by the antitrust laws. Thus, the Court of Appeal's preoccupation with the "power" conferred on private parties by the Designation Statute is misplaced.[13] A remarkably similar argument was considered by this Court, and firmly rejected, in *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). After concluding that California's Automobile Franchise Act did not compel or sanction a violation of the Sherman Act (*id.* at 110), the Court stated:

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[12]The Department of Justice noted in its brief that the fact that the Designation Statute gives the force of state law to a brand owner's selection of wholesalers to import its product "has no incremental effect on competition because . . . the designation statute does not insulate that selection from scrutiny under the antitrust laws." (United States Brief at 17 n.13.)

[13]The Court of Appeal also repeatedly stressed that the Designation Statute affects interstate commerce. 108 Cal. App. 3d at 356-58. An effect on interstate commerce is a jurisdictional prerequisite to analysis under the Sherman Act; it does not in and of itself establish a violation.

> *Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition.* "This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter of economic liberty.' . . . Nevertheless, *this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute.* For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133, 98 S.Ct. 2207, 2218, 57 L.Ed.2d 91 (1978).

439 U.S. at 110-11 (emphasis added).

The Designation Statute on its face merely prohibits California importer-wholesalers from purchasing a brand owner's products unless they have been designated by the brand owner or his agent. Clearly, it does not *compel* brand owner conduct which violates the antitrust laws. Each brand owner is free to designate as many importers as he chooses. Nothing in the Designation Statute prevents a brand owner from designating every licensed importer in the State, and nothing precludes a licensed importer from negotiating freely with a brand owner to obtain his designation. Further, nothing in the Designation Statute requires the creation of exclusive wholesale territories within California.

It is also clear that the Designation Statute does not purport to *authorize* conduct violative of the Sherman Act. If a brand owner designates or declines to designate authorized importers in such fashion as to violate the Sherman Act, nothing in the Statute purports to sanction such anticom-

petitive conduct.[14] *See Colby Distributing Co., Inc. v. Lennen*, 606 P.2d at 110. The Department of Justice, in its amicus brief in this case, acknowledged that "[t]he purposes of the antitrust laws would be fully served by recognizing that the Designation Statute does not insulate the brand owner's conduct from scrutiny under the antitrust laws." (United States Brief at 13-14.) Here, as in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. at 45-46, the state law is "firmly anchored to the assumption that the Sherman Act will deter" antitrust violations.

Because the Designation Statute does not compel or sanction any antitrust violation, this case stands in vivid contrast to *Midcal*, in which the state regulatory program in issue was invalidated because it mandated a "private price fixing arrangement," which is a *per se* violation of the Sherman Act. *Midcal*, 445 U.S. at 106. Accordingly, the judgment below must be reversed.

3. The Facts of This Case Do Not Warrant the Creation of a New Category of Per Se Violations.

Even if *GTE Sylvania* were not controlling in the present case, it is clear that the Court of Appeal erred in concluding that the Designation Statute, *on its face*, is *per se* violative of the Sherman Act.

The Court in *GTE Sylvania* emphasized that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." 433 U.S. at 58-59. The California Court of Appeal in the present case conceded that the Designation Statute was "unique" and was "difficult to analyze" in terms of any previously recognized categories of *per se* violation of the Sherman Act (*i.e.*, price fixing,

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[14]Moreover, "[this] Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Cantor v. Detroit Edison Co.*, 428 U.S. at 592-93 (footnotes omitted).

group boycotts or concerted refusals to deal, certain types of tying arrangements and horizontal market divisions). 108 Cal. App. 3d at 356. Nevertheless, the court, without the benefit of any factual analysis or consideration of the legitimate purposes served by the Designation Statute, ruled that the Statute was facially invalid. *Id.* at 356-58. The lower court thus embarked upon precisely the same process of "formalistic line drawing" employed in *Schwinn* but subsequently rejected in *GTE Sylvania*.

At a minimum, creation of a new category of *per se* Sherman Act violation requires a detailed factual evaluation of the actual economic effect of the marketing arrangement on competition in the marketplace in order to determine whether it has a "pernicious effect on competition," *and* a further inquiry into whether the arrangement lacks "any redeeming virtue." *GTE Sylvania*, 433 U.S. at 54, 58. The court below manifestly failed to point to any facts, applicable precedent or persuasive analysis which would justify a *per se* rule of illegality in this case.

Furthermore, this Court has repeatedly counseled caution and judicial restraint with respect to new departures from the rule of reason. "It is only after *considerable experience* with certain business relationships that the courts classify them as *per se* violations. . . ." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972) (emphasis added). *See also White Motor Co. v. United States*, 372 U.S. at 263. "The usual assumption is that a *per se* rule would grow out of a history of rule of reason cases all arriving at the same verdict." *Northwest Power Products, Inc. v. Omark Industries*, 576 F.2d 83, 88 (5th Cir. 1978). For example, in reversing a lower court's holding that the issuance of blanket licenses to perform copyrighted musical compositions is *per se* illegal, this Court, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), emphasized that even though the legality of such licensing practices had been considered in other cases,

there was "no nearly universal view" that the practices constitute "a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to careful assessment under the rule of reason." *Id.* at 16.

Similarly, there exists "no nearly universal view" that a state's sanction of vertical arrangements of the type authorized by the Designation Statute merits automatic condemnation under the Sherman Act. *Indeed, all relevant authorities are to the contrary.* In *Colby Distributing Co., Inc. v. Lennen,* the Kansas Supreme Court rejected a Sherman Act challenge to the validity of a Kansas law which established a vertical allocation of the wholesale branded liquor market to designated wholesalers. The Kansas law prohibited Kansas wholesale distributors from selling a brand of distilled spirits unless they were authorized by the distiller. To this extent the Kansas law is indistinguishable in effect from the Designation Statute, which prohibits California importer-wholesalers from purchasing or accepting delivery of distilled spirits unless designated by the brand owner. Moreover, the Kansas law goes further than the California statute here at issue by requiring exclusive territorial distributorships. Yet the Kansas Supreme Court held that "[t]he provisions of the [the Kansas law] on its [sic] face will allow sufficient brand and price competition to withstand allegations of a violation of the Sherman Anti-Trust Act." 606 P.2d at 110. This Court summarily dismissed an appeal from the Kansas court's decision in *Colby* for want of a substantial federal question. *Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen,* 449 U.S. 943 (1980).

Even absent state sanction, vertical marketing arrangements consisting of territorial or customer restrictions have been uniformly upheld when tested under the rule of reason. For example, based on the decision in *GTE Sylvania,* the *Schwinn* case itself was reopened, and the district court adjudged that the territorial and customer restrictions which Schwinn had included in its dealer agreements were valid

under the rule of reason. *United States v. Arnold, Schwinn & Co.*, 442 F.Supp. 1366, 1388 (N.D. Ill. 1977). *See also Muenster Butane, Inc. v. The Stewart Co. Inc.*, 651 F.2d 292 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15 (4th Cir. 1981); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751, 754-56 (9th Cir. 1980); *First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.*, 612 F.2d 1164 (9th Cir. 1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 461 F.Supp. 1046 (N.D. Cal. 1978) (decision on remand).

In a recent University of Chicago Law Review article, the Honorable Richard A. Posner, now a Judge of the United States Court of Appeals for the Seventh Circuit, argued persuasively for application of a *per se* rule of *legality* in the case of vertical marketing arrangements. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 46 U. CHI. L. REV. 6 (1981). The author, who was at the time a professor of law at the University of Chicago and a leading antitrust commentator, noted that "in no case, even in the Post-*Sylvania* period, when courts have required or at least permitted a deeper exploration of the facts than in the *Schwinn* era of per se illegality, has a *purely* vertical restriction on competition been shown to be anti-competitive."[15] *Id.* at 22 (emphasis in original).

In its amicus brief in this case, the Department of Justice, which has the principal responsibility for enforcing the Sherman Act, concluded that the Designation Statute does not conflict with the Sherman Act and that "[i]n the absence of an inconsistency with federal law, there is no reason to displace valid state interests in regulating liquor that the statutory designation requirement may serve—such as mon-

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[15]The pro-competitive aspects of vertical marketing arrangements are discussed extensively in the Brief of Petitioner Bohemian Distributing Company, Case No. 80-1030.

itoring and tracing of imported distilled liquor, aiding in the collection of excise taxes, or even facilitating the vertical imposition of *pro*-competitive territorial restraints."[16] (United States Brief at 13-14 (citation omitted) (emphasis in original); *see also id.* at 19 n.17.) Similarly, in *A.H. Cox, & Co. v. Star Machinery Co.*, 653 F.2d 1302, 1306 (9th Cir. 1981), the court recognized that "[c]ompetition is promoted when manufacturers are given wide latitude in establishing their method of distribution and in choosing particular distributors."[17] The promotion of interbrand competition and the other purposes served by the Designation Statute preclude a finding that it is without "any redeeming virtue" so as to merit application of a *per se* rule of illegality.

It manifestly cannot be concluded that the Designation Statute, on its face, is in "irreconcilable conflict" with the federal antitrust laws. In reaching a contrary conclusion, the Court of Appeal failed to recognize that the Designation Statute does not either compel or sanction conduct which violates the Sherman Act and does not immunize from judicial scrutiny private conduct resulting in an unreasonable restraint on trade. Thus, the court below violated the fun-

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[16]Although the views of the Department of Justice are of course not controlling, they are entitled to weight and, at the very least, caution against too ready a finding of *per se* invalidation. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. at 14-16.

[17]The Court in *GTE Sylvania* recognized that although vertical marketing arrangements reduce *intrabrand* competition, they promote *interbrand* competition, which is the primary concern of the antitrust laws. 433 U.S. at 54-56. The court below, however, relied on *United States v. Topco Assocs., Inc.*, 405 U.S. at 609-10, for the proposition that the distinction between an effect on intrabrand competition and interbrand competition is "irrelevant" in this case. 108 Cal. App. 3d at 357. The same proposition was rejected in *GTE Sylvania* on the ground that *Topco* involved a "horizontal restriction among ostensible competitors." 433 U.S. at 57, n.27. Horizontal restrictions of the type involved in *Topco* have long been held to constitute a *per se* violation of the Sherman Act (*United States v. Topco Associates, Inc.*, 405 U.S. at 608), making an analysis of any purported justification unnecessary. Clearly, the Designation Statute does not compel, sanction or encourage horizontal restraints among competitors.

damental precept that "enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. City of Detroit, Michigan*, 362 U.S. 440, 446 (1960).

B. The Twenty-First Amendment Validates the Designation Statute.

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, this Court reviewed its prior decisions interpreting the Twenty-first Amendment and concluded:

> These decisions demonstrate that there is no bright line between federal and state powers over liquor. *The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.* Although States retain substantial discretion to establish *other* liquor regulations, *those* controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."

445 U.S. at 110 (citation omitted) (emphasis added).

The Court in *Midcal* described the analysis to be applied by a state or federal court in deciding whether a state liquor regulation is saved by the Twenty-first Amendment from preemption by the Sherman Act, as follows:

1. The court must first answer the "threshold question" whether, apart from the Twenty-first Amendment, the statute conflicts with the Sherman Act. *Id.* at 102. If there is no such conflict, the state statute is not preempted and the court's inquiry need not proceed further.

2. If a conflict between the state statute and the Sherman Act is found to exist, the court must next determine if the statute concerns the state's decision whether to permit importation or sale of liquor, or how to structure the liquor distribution system. If the statute deals with either or both

of those subjects, then it is valid under the Twenty-first Amendment and hence is not preempted by the Sherman Act. *Id.* at 110. Again, there is no need for the court to inquire further once this determination is made.

3. If the statute is another kind of liquor regulation *and* it conflicts with the Sherman Act, the Court must then analyze the competing state and federal interests involved to determine whether the protection of state interests afforded by the statutory scheme is outweighed by its impairment of the federal interest protected by the Sherman Act. *Id.* at 110-14. Only if that question is answered affirmatively—as it was in the special circumstances of *Midcal*—should the state statute be held preempted by the Sherman Act.

In this case, the Court of Appeal erred at each step of the analysis required by *Midcal*.

First, as we have shown (at pp. 11-27, *supra*), there is no conflict between the Designation Statute and the Sherman Act.

Second, the Designation Statute falls within *both* elements of California's plenary power over "whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S. at 110.

In this connection the several States' "virtually complete control over whether to permit importation . . . of liquor" is not limited to determining whether a state is to be either "wet" or "dry," but extends as well to deciding *who* is to be permitted to import liquor and *what brands* each may import. For example, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court considered the validity of a California law which limited the persons authorized to import beer to those who paid a $500 license fee for the privilege. Although recognizing that the imposition of such a fee as a condition of importation "would obviously have been [an] unconstitutional" burden on interstate commerce prior to the ratification of the

Twenty-first Amendment, the Court concluded that such a regulation was within the scope of the state's authority under the Amendment. *Id.* at 62. Justice Brandeis, speaking for the Court, stated in unqualified terms the scope of a state's power to determine whether and by whom liquor may be imported:

> The Amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof," abrogated the right to import free, so far as concerns intoxicating liquors. *The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions it prescribes.*
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> . . . Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?

Id. at 62-63 (citations omitted) (emphasis added).

The Court also made it clear that the State's authority extended to control over the types of alcohol which may be imported as well as to the persons authorized to import it:

> There is no basis for holding that it [the State] may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?

Id. at 63.

As was the case in *Young's Market*, California here has chosen to "channelize desired importations by confining them" to persons meeting certain statutorily-established

criteria. Exercising its power under the Twenty-first Amendment, California has long prohibited importation except by wholesalers who hold an importer's license. CAL. BUS. & PROF. CODE §§ 23775 and 23027 (West 1964). Since 1973, California has prohibited importation of branded liquor except by importer-wholesalers who are designated by brand owners to handle their products. These enactments of the California Legislature are clearly within the State's plenary control over whether to permit importation of liquor.[18] Indeed, the conduct in which petitioners below have engaged is proscribed by the express language of the Twenty-first Amendment itself: "The . . . *importation* into any state . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, *is hereby prohibited.*"[19] (emphasis added.)

Enactment of the Designation Statute also falls within California's "virtually complete control over . . . how to structure the liquor distribution system." The Statute reflects California's continuing preference for a distribution system whereby brand owners select the distributors for

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[18]Other cases in which this Court upheld state enactments prohibiting the importation of liquor or—as in the present case—conditioning such importation upon the importer's compliance with state requirements include *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939), and *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939) (both prohibiting importation of liquor from states which forbid importation from other states); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (prohibiting importation of any brand of liquor having an alcohol content of more than 25 percent by volume unless the brands is registered in the U.S. Patent Office); *Colby Distributing Co., Inc. v. Lennen*, 227 Kan. 2d 179, 606 P.2d 102, appeal dismissed sub nom. *Grant-Billingsley Wholesaler Liquor Co., Inc. v. Lennen*, 449 U.S. 943 (1980) (prohibiting wholesale distributors from selling a brand of distilled spirits unless authorized by the distiller). In *none* of these cases did the Court find it appropriate to balance the competing federal and state interests involved.

[19]In *Midcal*, the Court acknowledged that "[i]n determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision. . . ." 445 U.S. at 106-07 (citation omitted).

their products, as opposed to an "open wholesaling" distribution system, whereby all wholesalers have access to all brands. Moreover, the Statute reconfirms California's historic decision to have a three-tier distribution system, consisting solely of brand owners, California importer-wholesalers and California retailers, as opposed to an administratively more burdensome system, now engendered by the "Oklahoma connection," consisting of brand owners, *Oklahoma wholesalers*, California importer-wholesalers and California retailers. The Designation Statute thus falls well within California's plenary power to decide "how to structure the liquor distribution system" because it protects against the imposition of an undesired "fourth tier" on California's three tier system.[20]

Since the Designation Statute falls within the core of the powers granted to the States by the Twenty-first Amendment, as interpreted in *Midcal*, there was no occasion for the Court of Appeal to balance the competing state and federal interests served by the Designation Statute and the Sherman Act, respectively. If the two enactments were in conflict—which petitioners have shown is *not* the case—the Designation Statute would clearly prevail by virtue of the Twenty-first Amendment, because it deals directly with

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[20]Cases in which this Court upheld state enactments dealing with the structure of a state's liquor distribution system include *Heublein, Inc. v. South Carolina Tax Commn.*, 409 U.S. 275 (1972) (requiring out-of-state distillers to make initial shipments to in-state facilities in care of the distiller's resident representative); *Colby Distributing Co., Inc. v. Lennen*, 227 Kan. 2d 179, 606 P.2d 102, appeal dismissed sub nom. *Grant-Billingsley Wholesaler Liquor Co., Inc. v. Lennen*, 449 U.S. 943 (1980) (determining composition of middle tier of three-tier distribution system by prohibiting distributors from selling a brand of distilled spirits unless authorized by the distiller); *cf. Ziffrin, Inc. v. Reeves*, 308 U.S. 139 (1939) (regulating distribution by permitting transportation of liquor only by common carriers licensed by state). In *none* of these cases did the Court find it appropriate to balance the competing federal and state interests involved.

permission to import liquor and the structure of California's liquor distribution system.[21]

Third, assuming *arguendo* that a balancing test would have been appropriate in the case below, the Court of Appeal erred in two respects when it attempted to determine whether the state interests protected by the Designation Statute were outweighed by the Statute's asserted impairment of the federal interests served by the Sherman Act. Initially, we note that the court misapprehended the nature of the federal antitrust interests and thus attributed too much weight to what it perceived to be the Statute's impairment of federal interests; and further, the court accorded too little weight to the protection of valid state interests which the Designation Statute would have accomplished had it been given an opportunity to serve the purposes for which it was enacted. The court therefore failed to strike the proper balance between the federal and state interests involved in this case.

The Court of Appeal began its analysis with an expansive description of the federal policies served by the Sherman Act:

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[21]It is true that the Court of Appeal stated that the Designation Statute "does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution." 108 Cal. App. 3d at 359. The court gave no reasons for this conclusion, and it finds no support in the language of the Statute or in this Court's decisions. Of course, whether or not a state statute is to be interpreted as falling within the ambit of the virtually plenary powers granted to the States, as described in *Midcal*, is a federal question upon which this Court is the final authority, because the question implicates the interpretation of both the Twenty-first Amendment itself and this Court's decisions interpreting the Amendment. The Court of Appeal's determination of that federal question is plainly wrong and should be disregarded by this Court in deciding the validity of the Designation Statute under the Twenty-first Amendment. *See Midcal*, 445 U.S. at 111; *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *United States v. Bedford*, 519 F.2d 650, 654 n.3 (3rd Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) ("It is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws or of a state statute under misapprehension of federal law.").

> In *California Liquor Dealers v. Midcal Aluminum, supra,* the United States Supreme Court noted that the federal interest in enforcing the national policy in favor of competition is both familiar and substantial, citing a prior decision in which it was stated: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

108 Cal. App. 3d at 360 (citations omitted).

Then, in assessing the extent to which these policies would be impaired by the Designation Statute, the court concluded, without analysis, that the Statute "results in a *complete undermining* of the federal policies embodied in the Sherman Act." *Id.* (emphasis added).

The court's unreasoned conclusion has no rational application to the very limited effect of the Designation Statute on the federal interests protected by the Sherman Act. As we have pointed out (at pp. 19-22, *supra*), the Designation Statute does nothing more than sanction and enforce vertical allocation by brand owners of the California wholesale market for their distilled spirits. This tends to enchance interbrand competition while reducing intrabrand competition, and interbrand competition is the chief concern of the antitrust laws. (*See* discussion at p. 26 n.17, *supra.*) Assuming, *arguendo,* that the legislative plan reflected in the Designation Statute were found by this Court to violate the Sherman Act, the Statute's asserted impairment of competition leading to that conclusion could scarcely be comparable in magnitude and economic effect to that of the mandatory price-fixing scheme which was before the Court in *Midcal.*

In a Twenty-first Amendment balancing of interests analysis, the nature of *federal interests* involved and the extent to which they may be impaired are clearly matters as to

which this Court is the final arbiter. Accordingly, if the third step of the *Midcal* analysis were reached by the Court in this case, the Court should make an *independent*—and markedly different—determination from that of the court below as to the weight to be given any impairment of federal interests which the Designation Statute may cause.

As pointed out in *Midcal*, what *state interests* are protected by a state enactment and the weight to be given them in a Twenty-first Amendment balancing of interests analysis are ultimately for this Court to decide:

> Of course, the findings and conclusions of [state] courts [pertaining to the state interests protected by a statute] are not binding on this Court to the extent they undercut state rights guaranteed by the Twenty-first Amendment.

445 U.S. at 111 (citations omitted).

It is also true, as pointed out in *Midcal*, that this Court

> accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances."

Id. at 111-12 (citations omitted).

However, little weight should be given to the Court of Appeal's cavalier treatment of the state interests which are protected by the Designation Statute. This is because the court below made no attempt to determine how well *in fact* the Statute serves the interests it was enacted to protect. In contrast, the California court in *Midcal* relied on the findings recited in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P.2d 476 (1978), in which the California Supreme Court determined, as a matter of *fact*, that California's resale price maintenance statutes did not significantly enhance the interests they were asserted to serve, which were the promotion of temperance and the protection of small retailers. After reviewing the factual bases for the

state court's findings, the Court in *Midcal* chose to accept those findings because they were both "supported by the evidence" cited in *Rice* and "reasonable." 445 U.S. at 113. In the present case, however, the Court of Appeal's superficial analysis of the state interests protected by the Designation Statute was unsupported by any evidence or persuasive reasoning. Accordingly, the minimal respect and weight attributed to the Statute by the Court of Appeal, in its attempt to balance the state interests against the federal interests, should not be given any deference by this Court in making its independent determination of the validity of the Statute under the Twenty-first Amendment.

A brief review of some of the purposes served by the Designation Statute confirms that the California interests furthered by the Statute should be given significant weight by this Court in the event the Court reaches the point of balancing state and federal interests in this case. For example, the Designation Statute simplifies the State's task in monitoring and tracing the flow of distilled spirits into California. If the Designation Statute were in effect, the State's control over misbranding, adulteration or contraband involving a brand of distilled spirits imported into California would be strengthened because, in order to determine whether a particular shipment of that brand was legitimately in California, the regulatory authorities would only be required to look to a single supplier (*i.e.*, the brand owner) and to the licensed importers he has designated.[22] Absent the Designation Statute, the State's monitoring function is

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[22]It is true that California law does not, by its terms, require that a designated California importer purchase directly from the brand owner as opposed to purchasing from another wholesaler, in Oklahoma or elsewhere. However, because California has a "price affirmation" law, precluding brand owners from selling distilled spirits to any California wholesaler at a price higher than the lowest price charged in any other state (CAL. BUS. & PROF. CODE § 23673 (West 1981)), there is little, if any, economic incentive for a designated importer to seek an alternative source of supply.

significantly complicated because (1) the number of potential sources of supply for a particular brand has increased due to the addition of Oklahoma wholesalers and potential suppliers from other states, (2) any and all California importers may acquire any brand of distilled spirits, and (3) the location and identity of the importers of a particular brand are subject to monetary change. (*See* R. Wholesalers Association's Memorandum of Points and Authorities in Opposition to Petition for Writ ("Wholesalers' First Memorandum") at 31-33, filed on Dec. 6, 1979 (J.A. 3); R. Memorandum of Points and Authorities of Intervenor Wine and Spirits Wholesalers of California in Support of Return to Alternative Writ ("Wholesalers' Second Memorandum") at 39-42, filed on Jan. 21, 1980. (J.A. 5.) The State unquestionably has a legitimate interest in facilitating the monitoring of distilled spirits transactions in order to assure compliance with its laws. *See, e.g., Heublein, Inc. v. South Carolina Tax Commission,* 409 U.S. 275, 282-83 (1972); *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 139 (1939).

Similarly, under the Designation Statute, the determination of whether a designated wholesaler has paid California's $2.00-per-gallon excise tax on a brand of distilled spirits (as required by CAL. REV. & TAX. CODE §§ 32201 & 32251 (West 1979)) may be facilitated by comparing the records and inventory of the wholesaler with the records of the brand owner or other primary supplier who ships the liquor. Without the Designation Statute, any brand owner's product may be obtained by any California wholesaler from an Oklahoma wholesaler or other out-of-state supplier who acts solely as a jobber by purchasing from the brand owner for quick resale to a California wholesaler. Such a supplier's records may not be reliable or readily available to aid state authorities in determining whether the California excise tax has been paid. Also, the increased number of out-of-state suppliers and potential California purchasers of a particular brand results in a significantly increased administrative bur-

den on the State in its efforts to verify and enforce the payment of taxes. (*See* R. Wholesalers' First Memorandum at 33-34; R. Wholesalers' Second Memorandum at 43-44.)

Furthermore, California has a legitimate interest in restoring a distribution system to California whereby vertical market allocations are permitted because of their perceived pro-competitive effects on interbrand competition. A brand owner's legitimate interest in assuring the effective and efficient distribution of his products coincides with the State's interests in maintaining the orderly distribution of alcoholic beverages and in encouraging interbrand competition. (*See* discussion at p. 26, *supra; see also* R. Wholesalers' First Memorandum at 35a-35b; R. Wholesalers' Second Memorandum at 47-49.)

Other significant state purposes served by the Designation Statute, and discussed in detail in the briefs, declarations and affidavits submitted to the Court of Appeal, include facilitating the State's enforcement of the three-tier system for distributing distilled spirits (J.A. 52; R. Wholesalers' First Memorandum at 34-35; R. Wholesalers' Second Memorandum at 44), preserving the competitive viability of small retailers (J.A. 52; R. Wholesalers' First Memorandum at 35-36; R. Wholesalers' Second Memorandum at 45-47), and enabling brand owners to protect their goodwill and the integrity of their brand names and trademarks by choosing their distributors (J.A. 52; R. Wholesalers' First Memorandum at 35b; R. Wholesalers' Second Memorandum at 49-50). Individually and collectively, these state purposes demonstrate that substantial state interests are served by the Designation Statute. These state interests are entitled to be given significant weight by this Court should it reach the point of reconciling federal and state interests to determine whether the Designation Statute is a valid enactment by virtue of the Twenty-first Amendment.

C. The Judgment Below Should Be Reversed Because the State Has Not Had an Opportunity to Exercise the Active Supervision Necessary to Bring the Statutory Scheme Within the "State Action" Exemption to the Antitrust Laws.

Assuming, *arguendo*, that the Designation Statute does require or sanction conduct which ordinarily would be prohibited by the Sherman Act, and assuming further that the Statute is not validated by the Twenty-first Amendment, the judgment below was nevertheless erroneous because the state regulatory authorities have not had an opportunity to administer the Statute in a fashion that would bring it within the state action exemption to the antitrust laws which was established in *Parker v. Brown*, 317 U.S. 341 (1943).

In *Midcal*, this Court, after reviewing the cases subsequent to *Parker v. Brown* which adjudicated claims of state action exemption, identified two essential elements necessary to establish antitrust immunity under the state action doctrine: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (citation omitted).

There can be no dispute, and the California Court of Appeal did not disagree, that the first requirement, namely a clearly declared "state policy," is satisfied in this case. By adopting the Designation Statute, California has unequivocally declared its support for a liquor distribution system whereby distilled spirits are distributed through importer-wholesalers designated by the brand owner as distinguished from an "open wholesaling" system such as the distribution scheme in effect in Oklahoma. However, the Court of Appeal held that the Designation Statute does not provide sufficient state supervision of the private conduct it authorizes in order to meet the second requirement of *Midcal*. 108 Cal. App. 3d at 358-59. This pronouncement was erroneous because it came before the operative date of

the Designation Statute, as amended by California Assembly Bill No. 499, and thus effectively precluded the State from meeting the second requirement through its enforcement and implementation of the Statute.

On January 1, 1980, when the Designation Statute was scheduled to become operative, California had in place an extensive constitutional and statutory framework which provided for the State's ongoing supervision of all phases of the liquor traffic within the State. See *e.g.*, Cal. Const. art. XX § 22; Cal. Bus. & Prof. Code § 24200. The State's authority consists of (1) the power to issue and revoke licenses, and (2) the power to promulgate administrative rules and regulations. *First*, in connection with the State's licensing authority, the Department of Alcoholic Beverage Control has broad disciplinary power over the conduct of importer-wholesalers and out-of-state shippers of distilled spirits. The Department may revoke or suspend an importer-wholesaler's license if its continuance would be "contrary to public welfare" or if the licensee has been convicted of a public offense involving moral turpitude. CAL. CONST. art. XX, § 22; CAL. BUS. & PROF. CODE §§ 24200(a) and (d). The Department may also revoke or suspend an out-of-state shipper's certificate for cause in the same manner as "provided for the suspension or revocation of a license." *Id.* § 23366.3(b). Therefore, the Department's licensing authority over the conduct of importer-wholesalers and out-of-state shippers gives it ample opportunity to monitor the effect of the Designation Statute and take appropriate action should it determine that the effect in a particular case is contrary to public welfare. This continued oversight by the Department is precisely the type of state supervision which this Court found sufficient to merit application of the state action doctrine in *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977).

Second, the California Alcoholic Beverage Control Act requires the supervisory agency, the Department of Alco-

holic Beverage Control, to control, monitor and maintain close supervision over the importation and distribution of alcoholic beverages on a continuing basis. *See* CAL. BUS. & PROF. CODE § 23049 *et seq.* and § 25750 *et seq.* (West 1964). If the Designation Statute had been permitted to become effective, the Department would have had an opportunity to monitor and assess the effect of the Statute and issue appropriate supervisory regulations under its authority to "make and prescribe such reasonable rules as may be necessary or proper. . . ." CAL. BUS. & PROF. CODE § 25750 (West 1964); *see also* CAL. CONST. art. XX, § 22.

In fact, prior to the declared effective date of the Designation Statute, the Department had already issued rules which included a requirement that each brand owner who ships distilled spirits into California provide the State with a "written undertaking and agreement" identifying the importer-wholesalers who have been designated and the brands they are authorized to receive. The shipper is required to keep the information current by filing amendments with the Department as changes occur. (P.A. *F* 23-26.) Pursuant to the authority granted to the Department by California Business and Professions Code section 23366.3, the Department's rules also require that the written undertaking and agreement include a provision requiring the shipper to "make available . . . for inspection and copying by the department, all books, documents, and records, located both within and without the state, which are pertinent to the activities of the . . . [shipper] in connection with the sale and distribution of its products within this state." (P.A. *F* 25.)

It cannot be lightly assumed, as the lower court apparently did, that the Department will decline to exert active supervision sufficient to satisfy the second requirement of *Midcal*. In essence, the appellate court's judgment required the impossible, *i.e.*, (1) the enforcement of a supervisory scheme even before the state statute's effective date, and (2) the

adoption of new regulations in advance of an opportunity of the State to determine the need for such regulations in light of the Statute's operation in fact.

Thus, the posture of this case is materially different from that in *Midcal*, in which the state action exemption was held inapplicable. The statutes in issue in *Midcal* were part of a regulatory scheme which had not been re-examined and over which the state had not exercised any control in the *45 years* since its adoption. *See Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d at 440-41; *California Retail Dealers Assoc. v. Midcal Aluminum, Inc.*, 90 Cal. App. 3d 979, 983, (1979), affirmed in *Midcal*.[23] It is also significant that, unlike in *Midcal*, the Designation Statute has been the subject of recent re-examination by the California Legislature. As previously discussed, after the decision in *Rice*, the Department of Alcoholic Beverage Control took the position that the Designation Statute was unenforceable because of its reference to California Business and Professions Code section 24755, a reference rendered obsolete by *Rice*. After having had the opportunity to consider the *Rice* case and re-examine the Designation Statute, the California Legislature elected to reinstate the Statute's effectiveness by enacting A.B. 499.

Accordingly, even if this Court were to hold that the Designation Statute is otherwise in conflict with the Sherman Act and is not validated by the Twenty-first Amendment, the decision below must be reversed because the Court of Appeal foreclosed the opportunity for the State to utilize its regulatory mechanism to supervise the operation of the Designation Statute.

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[23]Similarly, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the state action exemption was held inapplicable because the Michigan Public Utility Commission had, over many years, passively accepted tariffs filed by the utility.

D. The Commerce Clause Does Not Invalidate the Designation Statute.

The principal issue which the California Court of Appeal expressly addressed in this case was whether the Designation Statute is preempted by the Sherman Act. The court's *sole* reference to the Commerce Clause—an issue not addressed by any of the parties—was a passage in which the court concluded, without citation of authority, that the Statute "is in direct contravention of the express terms of the Commerce Clause and the Sherman Act." 108 Cal. App. 3d at 358. If the court below intended this passing reference to the Commerce Clause as an alternative basis for invalidating the Designation Statute, the ruling betrays a fundamental misunderstanding of the limited nature of the restrictions which the Commerce Clause places on the legislative authority of the states.

In the absence of specific Congressional legislation enacted pursuant to it, the Commerce Clause preempts only state laws which discriminate against interstate commerce in favor of intrastate commerce or which prohibit or unduly restrict the volume of interstate commerce entering or leaving a state. The Commerce Clause does *not* invalidate state laws which do no more than change the structure of the interstate market or which are prohibitive or burdensome only with respect to particular firms engaged in that interstate business. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126-28 (1978); *American Motor Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219, 223 (4th Cir.), *cert. denied*, 444 U.S. 836 (1979).

For example, in *American Motor Sales Corp. v. Division of Motor Vehicles*, the Court of Appeals for the Fourth Circuit sustained a state statute which limited the number of motor vehicle dealerships for a particular make in a trade area. The court reasoned that the Commerce Clause does not prohibit a state regulation which merely shifts the flow of commerce from one dealership to another or from one

interstate supplier to another. Although the statute precluded the establishment of a competing dealership to sell a make of vehicle, the public could purchase the same vehicles from an existing franchised dealership, or could buy competitive vehicles. 592 F.2d at 223. The court also held that a restriction on intrabrand competition which can withstand scrutiny under the Sherman Act does *not* constitute an impermissible burden on interstate commerce (*id.* at 223-24)—a ruling directly applicable to the facts of this case. Clearly, it cannot be concluded that the Designation Statute, on its face, will bring about a result proscribed by the Commerce Clause. *Compare Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 44, 52 (1966).

The Designation Statute does not violate the Commerce Clause for a second, independent reason. Although the Commerce Clause places restrictions, as discussed above, upon the power of the states to restrict the flow of interstate commerce in most commodities, the Twenty-first Amendment carves out an exception in favor of the states in the field of liquor regulation. *Craig v. Boren*, 429 U.S. 190, 206 (1976). A state may prohibit *all* interstate commerce in distilled spirits. *A fortiori*, a state may, insofar as the Commerce Clause is concerned, determine what commerce may exist and by whom it may be carried on. *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. at 62. Accordingly, it is a well-established principle that the Twenty-first Amendment reserves to the states the power to regulate the importation and distribution of alcoholic beverages "unconfined by traditional Commerce Clause limitations." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. at 42, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964). Applying this principle, courts have rejected challenges on Commerce Clause grounds to state laws analogous to the Designation Statute. *Allstate Beer, Inc. v. Julius Wile Sons & Co., Inc.*, 479 F.Supp. 605, 610 (N.D. Ga. 1979); *Dakota Wholesale Liquor, Inc.*

v. Minnesota, 457 F.Supp. 480, 481-82 (D. Minn.), *aff'd.*, 584 F.2d 847 (8th Cir. 1978) (ruling on motion for preliminary injunction).

Because the Designation Statute does not impermissibly burden interstate commerce and falls squarely within the State's authority under the Twenty-first Amendment, the ruling of the Court of Appeal—to the extent it is based on the Commerce Clause—represents a novel and erroneous interpretation of the constitutional provision and places an unwarranted restriction on the authority of the states to regulate the importation and distribution of distilled spirits.

Conclusion.

Based on the foregoing, it is respectfully submitted that the Judgment below should be reversed.

Respectfully submitted,

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Nos. 80-1012, 80-1030, 80-1052

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

BAXTER RICE, Director,
Department of Alcoholic Beverage Control
of the State of California,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

BOHEMIAN DISTRIBUTING COMPANY,
Petitioner,

vs.

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WINE & SPIRITS WHOLESALERS OF CALIFORNIA,
a California corporation,
Petitioner,

vs.

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Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

CONSOLIDATED BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Is it lawful for a manufacturer to prevent interstate commerce in goods which he has sold *without restriction*?

2. Should this Court reverse a California state court decision invalidating a California statute, where that decision was based on a finding that California had no regulatory interest in the statute?

3. May a state rely upon the Twenty-first Amendment to authorize unsupervised private conduct which constitutes a per se violation of the Sherman Act?

4. Does the "state action" exemption to the Sherman Act insulate from preemption a California statute which, without any state review or supervision, allows private distilling companies to exclude wholesalers from commerce?

5. Is A.B. 499 preempted by the Federal Alcohol Administration Act?

6. Does A.B. 499 deprive a state-licensed liquor importer of due process by empowering a private party to nullify the importer's license without regulatory standards, a hearing, review or appeal?

7. Does A.B. 499 deprive state-licensed liquor importers of equal protection of the law by conferring the privilege of importing only on those importers who obtain the consent of a private party?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provisions cited by Petitioners, this case involves the following:

U.S. CONST. amend. XIV, § 1:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Alcohol Administration Act § 5, 27 U.S.C. § 205:

> "It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesalers of distilled spirits, wine or malt beverages, or as a bottler, or warehouseman and bottler, or [sic] distilled spirits, directly or indirectly or through an affiliate:
>
> (a) *Exclusive outlet.* To require by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce. . . ."

CAL. CONST. ART. XX, § 22:

> "The State of California . . . subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive

right and power to regulate the importation into and exportation from the State, of alcoholic beverages."

I

STATEMENT OF CASE

While this case can be decided purely as a matter of law, it is important to understand the factual context in which it arises, particularly in view of the large amount of misinformation in the briefs of Petitioners and their amici.

The great bulk of distilled spirits consumed in California (except brandies) is produced outside the state and must be imported. Nationally advertised brands account for over 90% of California consumption. The brand owners of these brands are large national distilling companies. The six largest distillers in the United States—Seagram, Heublein, Hiram Walker, National Distillers, Schenley and Brown Forman—control the production and distribution of approximately 60% of all distilled spirits consumed in the United States. The next nine largest distillers—Bacardi, Fleischman, Somerset, Gordon Renfield, Jim Beam, Glenmore, Liggett, Buckingham, Foremost-McKesson—control another 25% of the market. JA 16, 28. Because the leading brands are 90% of the market and because nearly all of them are imported into California, a California wholesaler will be excluded from substantially the entire wholesale liquor market in California unless he may import the leading national brands.

The designation procedure at issue here was originally part of California's fair trade apparatus. In the original version of Cal. Bus. & Prof. Code § 23672, the party posting fair trade prices for a brand was given the power to dictate who could import the brand. In 1978, the California Supreme Court invalidated California's liquor fair trade laws as inconsistent with and preempted by the Sherman Act. *Rice v. ABC Appeals Board*, 21 Cal. 3d 431, 146 Cal.

Rptr. 535, 579 P.2d 476 (hereinafter *"Rice"*). Although review of *Rice* was never sought in this Court, the reasoning in *Rice* was substantially endorsed by this Court in *California Retail Liquor Dealers Ass'n v. Midcal, Aluminium, Inc.*, 445 U.S. 97 (1980) (hereinafter *"Midcal"*), which invalidated California's wine fair trade laws. *Rice* did not scrutinize § 23672, but Petitioner Rice, Director of California Department of ABC, decided that *Rice* rendered the original fair trade version of the designation statute unenforceable because the power to designate was delegated to the party posting the fair trade prices, a party which, after *Rice*, could not exist legally. JA 13.

Giving brand owners the power to designate who may import their brand into California may well have served the invalid purpose of the fair trade laws. Because the purpose of those laws was to insure that the brand owner could effectively fix, control and enforce prices at the retail level, it made little sense to allow importers not of his choosing to import his brand into the state. If the brand owner, on the other hand, were given the power to designate who could import, he could easily discipline importers or wholesalers who did not help him to enforce the fixed retail prices by revoking designation. Thus, the original delegation of power to brand owners to designate importers was part and parcel of the statutory scheme of fixed retail prices.

The wholesaler Respondents are fully licensed by the state to import distilled spirits, but prior to *Rice*, these wholesalers had never been able to import major national brands because they were never designated as importers by any of the big distilling companies. In 1978, after *Rice* was decided, the wholesaler Respondents began to purchase major national brands from wholesalers in Oklahoma, whose law permits wholesalers to resell to "qualified

persons" outside the state,[1] Some distillers choose to sell their brands to Oklahoma wholesalers without restriction on resale (but, nonetheless, refuse to designate Respondents as California importers). Oklahoma, in other words, provides a continuing source of major national brands outside the franchise system.[2]

Respondents and the Oklahoma wholesalers observe all reporting, regulatory and tax requirements of the states of Oklahoma and California and of the United States as to the interstate movement of this liquor. These rules and regulations are in fact exactly the same which apply to sales of liquor by the distillers to their franchisees. The Respondents also obtain full legal title to the goods they purchase in Oklahoma, without contractual restriction as to whom and where they resell the goods. In other words, the brand owner has no property or contractual rights in the liquor which Respondents obtain.

Unlike the Respondent wholesalers, the wholesaler-importers designated by the distillers are supplied directly by the distillers. Twelve or so major franchised distributors in California account for approximately 70% of the wholesale volume in the state. JA 18. Petitioner Bohemian (with its sister corporations) is the largest and handles an annual volume larger than the entire consumption of Oklahoma. JA 32. (See also Record, Exhibit B to Amended Petition for Writ of Mandate.)

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[1]On February 9, 1982, the Oklahoma Supreme Court, in *Central Liquor Co. v. Okla. A.B.C. Board,* No. 57-284, reaffirmed that Oklahoma wholesalers may sell to qualified out-of-state wholesalers. While the opinion notes that distillers are not required to sell to Oklahoma jobbers when the goods are destined for other states, the opinion nonetheless recognized that the distiller may choose, as a private contractual matter, to sell to Oklahoma jobbers without any restrictions on resale.

[2]Other such sources have become available elsewhere since 1978, including suppliers who have purchased liquor from distillers without restriction and franchised wholesalers who resell without restriction.

As indicated in the opinion of the California Court of Appeal, the Respondent wholesalers sell to retailers in California at prices below those charged by the designated franchisees. *Norman Williams Co. v. Rice,* 108 Cal.App.3d 348, 353, 66 Cal.Rptr. 563, 567 (1980). Major brand owners (distillers) promulgate to their franchisees lists of "suggested" prices for resale to the retailer. The franchised distributors rigorously adhere to the suggested wholesaler-to-retailer prices to within a few cents a case. JA 19. Thus there is no intrabrand price competition among the various franchisees.

The California court had before it the fact that the importation of brand name liquor from Oklahoma for the first time introduced significant price competition at the wholesale level in California. This fact went unchallenged. The Respondent wholesalers acquire their liquor in Oklahoma at a price several dollars per case *above* that paid by the designated franchisees (because of the Oklahoma jobbers' mark-up and the additional freight). Despite their higher cost per case, the Respondents sold cases to the retailers at net prices which were two to ten dollars below the suggested prices. JA 19. The Respondents were simply willing to take a lower mark-up than the designated franchisees. The resulting effect at the retail level was dramatic: a retailer carrying Oklahoma liquor, for example, would sell a fifth of Cutty Sark for $8 versus a usual retail price of $10.50. O'Donnell & Bamford, *Jack Daniels Meet Adam Smith,* FORBES, Nov. 23, 1981, 163, 164. A.B. 499 would empower the distillers to eliminate the discounting wholesalers, and thus reintroduces fair trade through the back door.

On the issue of price, the brief of the California Attorney General misreads the state court's conclusion, which was that the wholesaler-to-retailer prices charged by the Respondents for Oklahoma liquor are lower than the "suggested" wholesaler-to-retailer prices charged by the

franchised wholesalers. In a mistaken analysis, the Attorney General attacks the state court finding on price by arguing that the California price affirmation statute, § 23673, governs price competition at this level. The latter statute, which deals with *distiller-to-wholesaler* prices, requires the distiller to charge California wholesalers a price no higher than the lowest price charged by the distiller to wholesalers in other states. The price affirmation statute thus has no bearing or effect on price competition at the wholesaler-to-retailer level which would be threatened by A.B. 499.

The Respondent wholesalers handle a large variety of brands and bottle sizes—30 or 40 brands each. The bulk of their sales are to small retailers like the Respondent retailers and not to large discount retailers. (Record, Exh. C to Petitioners' Reply Memo. of Dec. 21, '79 and Exh. C to Petitioners' Replication of Feb. 5, 1980.)

The designation statute was amended by Assembly Bill (A.B.) 499 in 1979 to allow the "brand owner" to designate importers. The Respondent wholesalers each sought designation from all of the major distillers mentioned above, and were without exception denied designation. At this point, they filed the present action in the California courts which resulted in the invalidation of the statute.

II

SUMMARY OF ARGUMENT

A distiller sells to certain wholesalers in California, who compete with a second set of California wholesalers with an entirely independent supplier. This supplier is independent because the distiller has sold branded goods to him without restriction on resale. In selling the goods to this supplier the distiller has also parted with all title to and interest in the goods.

The restriction involved here arises as follows. If the distiller agrees to allow his wholesalers but not the second

group of wholesalers to import his brand into California, then the second group will be prohibited from importing the goods, even though they have legally purchased such goods from their third party supplier free of restriction. It is difficult to imagine any *per se* antitrust violation involving a more naked and outright prohibition on interstate commerce.

This unusual power to prohibit otherwise legal interstate commerce conducted by third parties is conferred by a California statute. The distiller exercises this power simply by agreeing to "designate" his group of wholesalers and refusing to designate the others. The conflict of this statute with the Sherman Act is the immediate issue here, and on this issue it is well established that a state statute may not authorize private parties to violate the federal antitrust laws. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

The instant case presents issues almost identical to those presented in *Midcal.* Just as it is a *per se* violation of the Sherman Act for fair trade statutes to empower a brand owner to set minimum retail prices for his brand in California, it is a *per se* violation for A.B. 499 to empower a brand owner of liquor to prohibit a wholesaler from importing branded liquor which has been legally purchased from a third party. In fact, A.B. 499 goes beyond fair trade in its anticompetitive effect. The distiller has more than the mere power to control the prices; he can actually decide who may compete and can prevent third parties from freely disposing of their own property.

The Petitioners attempt to attack the state court's opinion on the basis of a remarkable misreading of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (hereinafter *"Sylvania"*). Citing *Sylvania,* they contend that the state court erred in concluding that A.B. 499 authorizes a *per se* violation of the Sherman Act. While it is correct that

Sylvania abolished the *per se* rule against territorial restrictions imposed by a manufacturer on his own franchisee-distributor, *Sylvania* does not empower a distiller to do what A.B. 499 authorizes: To prohibit interstate commerce by *a third party* in goods purchased neither from the distiller nor his franchisee. Although a distiller may impose reasonable territorial restrictions on his own franchisees and terminate a franchisee who violates such restrictions, nothing in *Sylvania* authorizes a distiller or his franchisee to prevent the interstate movement of goods by a third party who has legally purchased those goods without restriction outside the franchise system.

Petitioners argue and Respondents concede that the Twenty-first Amendment gives the state powers it would not otherwise have to regulate commerce in liquor. In the present case, however, the California courts have determined that the statute serves no legitimate state regulatory goal related to liquor. Therefore the exclusionary device authorized by the statute cannot be justified as a liquor measure.

All of the purported state regulatory goals argued here were presented to the California courts. As the legitimate interpreter of the California's regulatory interest, the state courts had no difficulty in rejecting the numerous attempts by Petitioners to contrive some justification for this special interest legislation. The Petitioners nonetheless urge this Court to foist upon the State of California some state regulatory goal which even its own courts had been unable to discern. *Midcal,* however, noted that this Court customarily accepts the findings of state courts as to a state's regulatory interest in the absence of exceptional circumstances.

Because the California courts have established that the statute serves no legitimate state regulatory interest, the statute must also fail as violative of due process since it gives private parties a veto over the state's own licensing

procedure for importers without standards and without review or appeal. Likewise, the statute lacks a regulatory purpose which could justify its blatant discrimination between two groups: designated and non-designated importers. Since both groups have been fully licensed by the state to import, the only difference between them is whether they are in the good graces of a private party.

III

ARGUMENT

A. The Court Below Correctly Concluded That the Designation Statute Would Enforce Private Conduct Which Is Per Se Violative of the Sherman Act

In an opinion firmly anchored in *Midcal,* the California Court of Appeal ruled that A.B. 499 is preempted by the Sherman Act because the state statute, without furthering any state regulatory interest, would authorize a *per se* violation of the Sherman Act. A state may not allow, authorize or sanction private agreements or practices which are *per se* illegal under the Sherman Act. *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 386-89 (1951). *Schwegmann* invalidated a Louisiana fair trade law which allowed but did not compel liquor distributors to impose minimum prices.

1. A.B. 499 Empowers Private Parties to Prohibit Commerce of Their Competitors

It is important to understand the operation and effect of a designation under A.B. 499. The statute contemplates that each distiller or brand owner will agree with one or more California importers or wholesalers to sell his brand to the wholesaler and to authorize the wholesaler to import the brand into California. In the absence of the statute, such agreements between a distiller and a wholesaler would have no effect on importers who could legally obtain the same brand from some source other than the distiller, such as an Oklahoma wholesaler.

By operation of A.B. 499, however, anticompetitive consequences would result. If the distiller entered into designation agreements with a number of wholesaler-importers, the legal consequence would be that only the designated importers may import and all other wholesaler-importers would be prohibited from importing the brand, even if they may lawfully obtain the brand without restriction from someone other than the distiller. The statute does more than merely recognize the distiller's right to sell to whomever he pleases. It transforms his agreement to designate and sell to one or more importers into an *automatic* prohibition on importation by non-designated competitors of goods in which the distiller has no property right or ownership interest. The statute *requires* the distiller to enter into designation agreements. The *necessary* effect of the procedure is to exclude all non-designated importers.[3] The State of California would enforce this exclusion by private parties.

The designation procedure is thus a naked restraint on interstate commerce between two parties, an Oklahoma wholesaler and another California importer, who in a free market would be legally able to import liquor into California. In other words, private parties would be allowed and empowered by the State to exclude others from the market.

Amicus Heublein argues that the exclusionary device in A.B. 499 is essentially a unilateral act by the distiller and that there can be no *per se* violation in the absence of an agreement between two parties prohibiting commerce. The A.B. 499 exclusion, however, is not substantially dif-

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[3]The Attorney General of California completely misreads the state court's opinion on the nature of the *per se* violation. While the Attorney General mistakenly maintains that the state court treated this as a "price case" (A-G Brief, p. 26), it is clear from the state court's opinion that the *per se* violation was the exclusion of importers from the market. 108 Cal. App. 3d 348, 166 Cal. Rptr. 563.

ferent in this respect from the conduct found illegal in *Midcal* and *Rice*. In *Rice*, the distiller simply posted retail prices with the State. Not only were there no agreements between the retailer and the distiller; there was not even any contact between them. The retailer purchased from a wholesaler, and the law required that the retailer adhere to the posted retail prices. No agreement, fictional or otherwise, was required between the distiller and the retailer. Cal. Bus. & Prof. Code § 24755. Similarly, in *Schwegmann*, 341 U.S. at 387-389, a Louisiana statute provided that a wholesaler or another retailer could enjoin a retailer *who had not signed a fair trade contract* from underselling the prices fixed in any fair trade contract entered into by the distiller. The requisite contract or combination for a Sherman Act § 1 violation is also deemed to exist in a tying violation, although tying is essentially a unilateral decision by a seller to require his purchaser to buy one product as a condition to selling the same purchaser another product. If an "agreement" or "combination" restraining trade is implied in the latter cases, certainly a contract, combination or agreement should also be implied in the designation procedure.

While technically it is the distiller's refusal to designate which causes the exclusion rather than the distiller's designation agreements, the above discussion demonstrates that an agreement of the distiller with a designated importer is indeed an essential part of the designation procedure. The true vice of the statute is that it permits in some traders to the exclusion of others. Because a designation agreement is necessary to accomplish this overall effect, the designation agreements should be deemed to supply the element of "a combination" or "contract" specified in Sherman Act § 1.[4]

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[4]Considering statutes authorizing market exclusions from a different perspective, P. Areeda & D. Turner, I ANTITRUST LAW ¶ 209 (1978) at pp. 62-64, hypothesize a state statute prohibiting commerce in a particular item except by one company designated by

2. The Designation Procedure, Amounts to a Per Se Violation, of the Sherman Act

This Court has delineated some general tests and criteria for determining whether to apply the *per se* rule to anticompetitive practices. In *The White Motor Co. v. U.S.*, 372 U.S. 253, 263 (1963), *per se* violations were defined as "naked restraints of trade with no purpose except stifling of competition." In *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 692 (1978), practices were said to be *per se* illegal if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . ."

Applying the above guidelines for *per se* rules to designation agreements, it is readily apparent that no elaborate industry analysis is required to demonstrate the anticompetitive character and operation of the designation procedure. The necessary effect of the procedure is the outright exclusion of "non-designated" wholesalers with an independent source of supply who could otherwise legally compete. The theoretical possibility that a distiller may designate all importers licensed by the state should not remove designation agreements from the category of

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the state. The authors conclude that such a statute would be preempted regardless of whether a private party or the state is doing the actual "excluding." Even if the monopolist is a passive beneficiary of the statute and has not violated the antitrust laws, the authors argue, the law itself is nonetheless inconsistent with the Sherman Act scheme of free competition. The authors conclude that a state may not prohibit market entry or price competition which is favored by the Sherman Act. The same logic should apply here. Even if a distiller does not violate the antitrust laws by designation, the designation statute itself prevents free interstate competition.

Alternatively, the element of combination required in Sherman Act § 1 may be deemed to exist in the present case by virtue of the State's cooperation in enforcing the exclusions made by the distillers. *Parker v. Brown*, 317 U.S. 341, 351-352 (1942).

per se violations. As this Court observed in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980):

> "In any event, when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*." *Id.* at 649.

A.B. 499 certainly contemplates that the distiller will designate less than 100% of the importers licensed by the state.[5] Otherwise, the statute would have been totally superfluous.

Likewise it is irrelevant to the *per se* analysis that the statute does not limit the number of designees. Even if the distiller designates ten authorized importers, the real issue is whether the designation procedure excludes additional wholesaler-importers who would be able to operate in a free market. Such exclusions are definitely contemplated by the statute, which, to repeat, would otherwise have been superfluous.

3. Respondents Need Not Show That the Operation of the Statute Fits Exactly into a Previously Established Per Se Violation

The particular exclusionary practice authorized by A.B. 499 is analogous to many *per se* violations delineated in private antitrust cases. In general, an agreement between two or more parties depriving a third party of a source of supply is a *per se* violation. For example, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207

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[5]In *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 46 (1966) relied upon by Petitioners, the shoe was on the other foot. There this Court found no preemption because the possibility of conflict between federal and state law was "entirely too speculative." Here the possibility of no conflict is entirely speculative.

(1959), a retailer's agreement with manufacturers of electrical appliances not to sell to the retailer's competitor was found to be *per se* illegal. Another "group boycott" case, *U.S. v. General Motors Corp.*, 384 U.S. 127, 147 (1966), provides a closer parallel to the designation procedure in its anticompetitive effect. There, one group of GM dealers obtained GM's agreement to prohibit the second group of dealers from reselling GM cars to discounters. The Court noted that such a course of conduct was a "classic" restraint of trade, since it deprived the second group of dealers of their freedom to deal with the discounters if they so chose. *Id.* at 140.

The designation statute is likewise analogous to certain established *per se* violations where competition is excluded through an exclusionary membership policy in a trade association. For example, in *Associated Press v. U.S.*, 326 U.S. 1 (1945), *each* of the 1,300 newspaper members of the Associated Press had the right under the Association's By-Laws to veto the admission of its business competitor. Since the by-laws also prohibited sale of the Association's wire service to non-members, it was very difficult for a non-member to buy news. These exclusionary By-Laws were found to be a *per se* violation. As in the *Associated Press* case, a wholesaler in the present case must become part of "the club"—i.e., he must be "designated"—before he can effectively compete. *Id.* at 27-29.

The Petitioners misleadingly attempt to shoehorn the designation procedure into the rule in *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919). They contend that A.B. 499 merely confirms the unilateral right of each distiller to refuse to sell his brands to the Respondents. Such unilateral refusals are, of course, not judged under *per se* rules. However, the issue here is not, as the Petitioners erroneously contend, the freedom of the distillers to refuse to sell to Respondents, but whether the distillers should be allowed to pro-

hibit Respondents from purchasing from a third party. Respondents do not contend that federal law requires that the distillers sell directly to them. Respondents have a source of supply independent of the distillers, with which A.B. 499 would allow the distillers to interfere. In other words, A.B. 499 is not designed to allow the distiller to dispose freely of his own property; it allows him to interfere with someone else's free disposition of *his* own property.

The California court did not establish a new *per se* violation; it simply concluded that designation fell under the already well-delineated category of *per se* violations which "deprive others of access to merchandise which the latter wish to sell to the public. . . ." *U.S. v. General Motors Corp.*, 384 U.S. at 146. It is the ultimate in legal formalism to suggest that designation must be on all fours with a *particular* previously defined *per se* violation before it can be found to be inconsistent with the Sherman Act. The Sherman Act should be applied flexibly to anticompetitive devices and artifices. Were lower courts constrained to apply *per se* rules only in situations where the practice under consideration was on all fours with some particular previously defined *per se* violation, antitrust violators could easily evade the law by slight modifications to practices previously declared illegal.

The absence of a private antitrust case on all fours with the designation procedure reflects the fact that the statute delegates to private parties a power to prohibit interstate commerce so naked and so drastic that they could achieve it on their own only with the greatest difficulty. To conceive of a private antitrust case involving a practice analogous to the designation procedure, but effected strictly by private parties, one would have to imagine a device by which A and/or B could prevent C from bringing into the state goods which C had purchased from D. Short of a conspiracy to impede C physically at the state border, it is almost impossible to conceive of how private parties could

prohibit such commerce by strictly private means. The great difficulty in accomplishing such a restriction by private means only underlines the drastic power which has been created by the statute.

4. A.B. 499 Conflicts Inescapably with the Sherman Act

The state statute, then, authorizes, enables and enforces private conduct which excludes another trader from the market. Petitioners argue that, because A.B. 499 does not *require* a violation of the Sherman Act, there is no actual conflict between the two statutes and no preemption. Respondents concede that the state statute does not compel a distiller to exclude: he could theoretically designate all licensed importers. However, as explained above, the statute *authorizes* exclusions from the market, and this is enough to create an irreconcilable conflict while the Sherman Act. *Schwegmann, supra.* "[T]he State . . . may not simply authorize private parties to engage in activity that would violate the Sherman Act." *Community Communications Co. v. City of Boulder,* 50 U.S.L.W. 4144 at 4151 (January 13, 1982, dissenting opinion by Justice Rehnquist). For example a state statute authorizing horizontal agreements between private parties to allocate customers or territories would clearly be preempted by the Sherman Act even if it did not *require* such allocations. Petitioner Wine & Spirits Wholesalers concedes this point (Br., pp. 11-14). *See also* P. Areeda & D. Turner, I ANTITRUST LAW ¶ 209 (1978) at p. 60. The conflict between A.B. 499 and the Sherman Act is thus not merely some abstract or potential inconsistency regarding the competitive policy behind the two statutes. There is an inescapable conflict because the state statute authorizes a *per se* violation of federal antitrust law.

5. Sylvania Condones Restrictions Only on Franchisees, Not on Third Parties Outside the Franchise System

Petitioners maintain that there is no inescapable conflict with the Sherman Act because designation is at most a rule of reason violation rather than a *per se* violation. In other words, the argument is that designation will only violate the antitrust laws in certain circumstances. Petitioners contend that designation is analogous to territorial restrictions on franchisees, dealt with in *Sylvania*. In that case, the Court held that a territorial restriction imposed by a manufacturer on his franchisee should be judged under the rule of reason analysis rather than a *per se* rule. The Court found that such restrictions, while they concededly impaired int*ra*brand competition (between Sylvania's distributors), *may* have redeeming benefits.[6]

A.B. 499 is not analogous to *Sylvania*, because A.B. 499 restrictions act on different parties than do *Sylvania* restrictions. The rule of reason in *Sylvania* may well allow a distiller to prohibit *his own* franchisee from reselling his brand to a third party in another state. In the present case, however, the distiller sells his brand without such restrictions to an Oklahoma wholesaler. Such branded goods are then legally resold without restriction to a third party. Once a manufacturer has sold his branded goods without restriction, *Sylvania* does not allow him to go to the border and prohibit subsequent purchasers from carrying the goods over state lines.

Sylvania, in other words, stands for the principle that a manufacturer may impose reasonable territorial restric-

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[6] *Sylvania* did not find such restrictions to be *per se* legal. Such restrictions may still violate the Sherman Act if they in fact unreasonably restrain trade and provide no demonstrable benefit to int*er*brand competition.

tions on the operations of *his own franchise* as a condition to selling to that party directly. Should the franchisee violate such restrictions, *Sylvania* gives the manufacturer a remedy: terminate the franchise. *Sylvania,* however, does not give the distiller any power to reassert control over goods which have left *or never entered* the franchise system. If third parties may legally obtain the manufacturer's goods in a state where the distiller has sold them without restriction, *Sylvania* creates no remedy against the subsequent interstate movement of such goods.[7]

Certain distillers are currently willing to sell their brands to suppliers outside California without restriction on resale. Presumably these distillers find it profitable to do so. Once the goods have been sold to Oklahoma jobbers, they may freely and legally resell the goods to third parties like Respondents. Having voluntarily let the goods escape from the franchise system, the distillers may not now seek in *Sylvania* a justification for prohibiting commerce in such goods by third parties who have obtained the goods without contractual restriction. Neither could the California courts perceive any California state regulatory purpose for nullifying this side effect of the distillers' decision to market their brands in Oklahoma.

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[7]Under *Sylvania* the manufacturer's sole remedies are to impose restrictions on his own franchisees and refuse to sell to those franchisees if they violate the restrictions. In *Adolph Coors Co. v. A&S Wholesalers,* 561 F.2d 807 (10th Cir. 1977), a preliminary injunction obtained by a brewer against a non-franchisee transporting the brewer's brand in interstate commerce was found to be wrongful and was dissolved. 561 F.2d at 809, 811.

Petitioners argue that the net effect of A.B. 499 is the same "as if" vertical restrictions had been originally imposed by the distillers on the Oklahoma jobbers. This "as if" argument asks this Court to legitimize a restriction on the basis of an assumption contrary to fact. The fact is that some distillers sell to jobbers without such restrictions. The true issue therefore is not whether a vertical restriction has been imposed in Oklahoma but whether, having sold goods *without* vertical restrictions in Oklahoma, the distillers may employ a different and much more drastic restriction to subsequently exclude such goods from interstate commerce. This alternate drastic restriction must be judged on its own merits. If the Court is to condone such a restriction, it would be opening the door to the dangerous and incorrect principle that a manufacturer may reassert control over goods which he has sold or which have been resold without restriction and which have become the property of another party. Under the principles urged by Petitioners, nothing would seem to prevent a manufacturer from reasserting control over such goods even after they had reached the hands of the consumer.

A.B. 499 is not a restriction imposed by a manufacturer on his own distributor—a vertical restriction. When A selling to B is in competition with C selling to D, the statute authorizes A to reach directly across (not up and down) the ladders of distribution and block trade between C and D. The issue presented by the case is really whether one chain of distribution should be able to block a competing and independent chain of distribution. Not only in "direction" but also in its outright prohibitive effect, such a restriction is more analogous to horizontal restrictions than to *Sylvania*. The present case, therefore, does not resemble *Sylvania* in such "geometrical" terms, and it is equally obvious from the section below that the policy

considerations behind Sylvania are totally inapplicable here as well.[8]

6. There Are No Redeeming or Pro-competitive Benefits from A.B. 499

While the exclusionary effects of designation agreements are obvious, it is equally obvious that there are no counterbalancing competitive benefits from the statute which would warrant removing it from the *per se* illegal category. Erroneously invoking the policy considerations discussed in *Sylvania,* Bohemian claims that the restrictions which A.B. 499 imposes on int*ra*brand competition will promote int*er*brand competition and that, because of this redeeming virtue, A.B. 499 should not be judged under a *per se* rule. The argument is essentially that the exclusion of discounting importers and the consequent maintenance of high prices will encourage the franchisees to undertake promotional and advertising activities which will strengthen the brand. It is further argued that the high mark-ups protected by A.B. 499 would assist franchisees in the introduction and promotion of new brands or old sluggish brands.

Because virtually all brand advertising and promotional activities for the major brands are performed by the distillers themselves at a national level, the factual basis of this argument is questionable. The distillers' lack of any true interest in encouraging brand promotion by the franchisees is reflected in the fact that most of the large franchisees carry competing brands of different distillers. For example, Petitioner Bohemian, which touts its role as a promoter of brands in interbrand competition, in fact

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[8]Petitioners cite *Grant-Billingsley Wholesale Liquor Co. Inc. v. Lennen,* appeal dismissed 449 U.S. 943 (1980) in support of their *Sylvania* argument. This case is distinguished factually and legally in the discussion in Respondent's Brief in Opposition to Petitions for Cert., pp. 22-25.

carries over nine brands of scotches owned by five different and competing brand owners or distillers.[9]

Even assuming that the factual basis of this argument is correct, the real issue here is *whether the State of California, not the distiller, has a legitimate interest in intervening in a free market to encourage more advertising.* Although the state has a regulatory interest in temperance, it is certainly indifferent as a regulator to promoting new brands or old sluggish brands, especially if this is done at the expense of the exclusion of some traders from the market.

There is no other product for which the State of California prohibits free competition for the sake of encouraging promotional activities. If the state is to intervene in a free market for the sake of elevating prices to help finance more advertising and promotion, liquor should be the last product for which the state would want to do this. If anything, the state has an interest in encouraging less advertising of liquor. The purpose of the California ABC Act is the promotion of temperance. Cal. Bus. & Prof. Code § 23001. That advertising is a threat to temperance is clear from the many regulatory controls on it, e.g., no advertising on television.

The other possible kinds of enhancement of interbrand competition involved in *Sylvania* are likewise absent here. *Sylvania* dealt with the television industry, where it is important to product quality to encourage franchisees to invest in facilities for warranty service. *Id.* at 55. The reputation of a brand of television often depends on the easy availability of such services. While it may be important to protect a television dealer from intrabrand

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[9]Including Johnny Walker Black & Red (Somerset), Chivas Regal (Seagram), One Hundred Pipers (Summit), Whitehorse and Passport (Calvert). PATTERSON'S CAL. BEV. J., Dec. '81, pp. 123A-127A. Numerous other examples of such brand "piggybacking" are listed in the latter periodical.

competition from discounters who sell the television but do not provide the warranty services, warranty services are totally unnecessary in the liquor industry.

While the state has no regulatory interest in expanding the advertising aspect of interbrand competition, it is equally obvious that the statute will inhibit in*ter*brand price competition. The *factual* contention that suppression of in*tra*brand price competition in the California liquor industry would in any way enhance in*ter*brand competition was specifically considered and rejected by the California Supreme Court in *Rice*. Based on detailed price statistics, that Court concluded that suppression of intrabrand price competition under fair trade actually *impaired* interbrand price competition in the California liquor market, and in fact tended to encourage uniform interbrand pricing. 21 Cal.3d at 454-56, 579 P.2d at 491-92.[10] On the other hand in*tra*brand price competition will promote interbrand price competition, because the undercutting of the suggested prices by Respondents on one brand will cause the franchisees of a *competing* brand to consider meeting Respondents' price.

While arguing on the one hand that the consumer should be "taxed" with higher markups to pay for franchisee promotional devices, Bohemian also argues that distillers nonetheless have an interest in keeping the wholesaler-to-retailer prices as low as possible and will thus avoid excessively costly promotional services. Apparently assuming that lower wholesale prices will increase sales, Bohemian maintains that the interests of distillers with respect to price are congruent with those of consumers. History dis-

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[10] *Sylvania* does not hold that suppression of intrabrand competition will automatically enhance interbrand competition. To the contrary, the *Sylvania* court held that the degree of intrabrand competition and interbrand competition is totally independent. *Id.* at 51 n.19.

proves this contention. *Rice* noted that, when the distillers had the power to dictate California retail prices under fair trade, they set prices at a level which made them the highest in the nation. *Id.* 455. When *Rice* removed fair trade, and retail prices could become more responsive to supply and demand, California's retail liquor prices plummeted.

The history of fair trade thus demonstrates that the distillers would like retail prices to be higher than free competition would otherwise dictate. The reason for this is not hard to see. As noted in *Rice,* high liquor prices do not depress consumption. *Id.* at 457. Nor do low prices increase volume: consumption in California did not significantly increase when the end of fair trade brought markedly lower prices. With volume not dependent on price, the distillers have an interest in keeping wholesaler-to-retailer prices as high as possible. This removes the competitive pressure which wholesalers would otherwise exert on the distillers to lower the distiller-to-wholesaler prices. With prices one dollar higher per bottle, the wholesaler can get the same markup, but the distiller can get an extra dollar of revenue per bottle with no loss in volume.

In the absence of a *state* regulatory interest in more advertising, the consumer should certainly be given the free market choice between a discounter and a more expensive retailer whose prices reflect the cost of financing sales gimmicks, promotional frills and advertising.

Petitioners suggest that this case be used as a vehicle for extending *Sylvania* to hold that vertical territorial restrictions are *per se* legal. The discussion above amply demonstrates that this case involves neither a vertical restriction nor any of the underlying policy issues in *Sylvania.* Because there is no *Sylvania* type restriction involved here, this is not an appropriate case to extend *Sylvania.*

B. The Statute Is Not Saved from Preemption by the Twenty-first Amendment or the State Action Exemption

1. An Interest-Weighing Analysis Should Be Used

In deciding that A.B. 499 was not saved from preemption by the Twenty-first Amendment, the California Court of Appeal again reached a result compelled by *Midcal*. While the states obviously possess a large measure of control over the regulation of liquor, *Midcal* holds that, where state liquor laws and federal antitrust law conflict, state and federal powers over liquor must be harmonized in an interest-weighing analysis where "the national policy in favor of competition" is balanced against the state's own regulatory interests. *Midcal, Id.* at 101. Here the balance should be easy to strike. While the above discussion has shown that A.B. 499 inescapably conflicts with the Sherman Act, the courts of the State of California itself concluded that A.B. 499 would serve *no* legitimate state regulatory goals.[11]

2. The Statute Serves No Legitimate State Regulatory Goal

As this Court noted in *Midcal*, great weight should be given to a state court's evaluation of the relative interest of the state. Despite the numerous after-the-fact attempts of the Petitioners to contrive some regulatory purpose for this statute, the California courts could find no legitimate California state regulatory interest. Each of the purported goals presented here was rejected by the state court as insignificant. *Norman Williams, supra,* 108 Cal. App. 3d 348, 361, 166 Cal. Rptr. 563, 572. Respondents, however,

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[11]Whether the statute serves any legitimate state regulatory goal or interest is an issue also relevant to the other constitutional grounds on which Respondents have attacked it. Intrusion on due process or equal protection may only be justified by a rational regulatory purpose.

urge this Court to second guess California's own courts as to what California's regulatory interest is.

Petitioners' numerous attempts to contrive some regulatory purpose for the statute contrast with the absence in the statute itself of any standards or criteria for its own administration. In fact, as noted by the state court, the statute's delegation of power to private parties is "broad" and "unqualified" and the statute provides for no review by or appeal to a state agency to insure that state interests are in fact furthered. *Id.* at 361, 166 Cal. Rptr. 563, 572. Because the statute allows the brand owners to designate or refuse to designate arbitrarily, the statute can hardly serve any coherent regulatory policy in a rational manner.

The committee and caucus reports of the statute in the California legislature are likewise devoid of reference to any legitimate regulatory goal. JA 55-75. It is also apparent from these reports that Petitioner Rice, the Director of California ABC, neither sponsored nor supported this statute in the California Legislature. It would also appear that the commitment of Rice, versus the California Attorney General, to this type of regulation is dubious. In a recent interview, O'Donnell and Bamford, *Jack Daniels, Meet Adam Smith*, FORBES, Nov. 23, 1981, pp. 163-169, Rice, described as "the best known of the new brand of liquor deregulators", welcomed the arrival of price competition in the liquor business:

> "What's shaping up in the liquor business today is a classic case of survival of the fittest—similar to developments in the airline, trucking and savings and loan industries. 'Those that can adapt, will. Those that can't, perish,' says Rice, sitting in shirtsleeves in his overheated Sacramento office. 'That's the way the free enterprise system is supposed to work.' " *Id.* at 163.

Petitioners' various attempts to contrive some justification for the statute, which were each rejected by the state court, include:

a. *Promotion of temperance and protection of small retailers.* The only way in which the statute could conceivably serve these two goals would be by increasing prices. While it is clear that the statute will increase prices by excluding competition, the California Supreme Court in *Rice,* 21 Cal. 3d at 457, as endorsed by this Court in *Midcal,* determined that higher liquor prices promote neither temperance nor the preservation of "mom and pop" retailers. Under fair trade, California had the highest retail prices in the nation, and at the same time nearly the highest liquor consumption per capita. Market analyses cited in *Rice* also disproved the notion that small retailers can survive only when prices are artificially high. *Id.* at 455-457. Respondents, in fact, sell most of their goods to small retailers.

b. *Facilitation of the Tracing of Imported Liquor and of Auditing for Tax Purposes.* The legislative history of the statute is devoid of any reference to such an *actual* statutory purpose, and it is readily apparent that the statute does not serve these functions. The state court concluded that without A.B. 499 the California liquor industry is already subject to a comprehensive if not duplicative monitoring and auditing system which ensures that all legitimate federal and state informational interests are fully realized.[12] This system of reports and records, without A.B. 499, provides numerous cross-checks and independent verifications at all levels of the distribution chain by which importation, taxation, quantities, brands and prices can be easily monitored in exhaustive detail. All shipments, sales and transfers of liquor must be reported by all parties involved. These reporting requirements apply equally to liquor acquired from the primary

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[12]The complex web of state and federal controls includes California Department of Alcoholic Beverage Control (ABC) regulations, 4 Cal. Admin. Code, §§ 1, *et seq.*, California State Board of Equalization regulations, 18 Cal. Admin. Code §§ 2500, *et seq.*, and U.S. Bureau of Alcohol, Tobacco, and Firearms regulations, 27 C.F.R. §§ 194.221, *et seq.*

source (the distillers) or a secondary source (such as an Oklahoma jobber). To export to California, the Oklahoma jobbers are required to submit their out-of-state records to the jurisdiction of the California regulatory system. Cal. Bus. & Prof. Code § 23366.3.

A.B. 499 provides for no additional information or records. The language of the statute itself thus utterly fails to support Petitioners' contention that the goal was one of information or auditing. If Petitioners' argument is that eliminating some competitors will reduce the administrative burden of auditing imports or taxation, the elimination should be made by the state itself and not by self-interested members of the industry.

c. *To Offset Effect of Oklahoma Law.* The Petitioners also argue that the regulatory purpose of A.B. 499 is to allow California to foreclose intrusion on its regulatory system from Oklahoma's "open wholesaling" system. Because Oklahoma liquor comes fully under the control of California's comprehensive import and tax auditing system, the California court found that California has no inherent regulatory interest in forestalling the side effects of the Oklahoma system. Oklahoma liquor no more "interferes" with California's regulatory system than does liquor imported by the designated importers, as to which the same reports, controls, verifications, inspections, and audits are available. It is obvious that the only threat from Oklahoma is not to California's regulatory system but to the high prices maintained by the distillers and their franchisees.

d. *Encouragement of Advertising and Promotional Activities by Franchisees.* See discussion above, pp. 20 to 23.

e. *Preservation of the Three-Tier System.* California statutes already in place require a "three-tier" system, i.e., separate and independent ownership of the manufacturing, wholesaling and retailing tiers. Cal. Bus. & Prof.

Code §§ 23772, 25500 *et seq.* The policy behind this requirement is obviously to prevent large concentrations of economic power in the marketing of liquor by forbidding vertical integration. The three-tier requirement thus reflects an antitrust policy. The franchise system, by giving the distillers enormous control over the wholesaling tier, is actually somewhat at odds with the goals of the three-tier requirement. Rejecting Petitioners' attempt to justify A.B. 499 as an attempt to preserve the three-tier system, the court below found that, by giving the distillers even more control over the wholesale tier, the statute is actually counterproductive to the State's goal of insuring the independence of retailers, wholesalers and manufacturers. 108 Cal.App.3d 348, 369, n.3, 166 Cal.Rptr. 563, 572. On the other hand, importation of name-brand liquor which has come through the hands of an Oklahoma jobber would in fact further the purpose of the three-tier system by insulating California wholesalers and retailers from the economic power of the distillers. Even if one conceives of the Oklahoma jobbers as a "fourth tier," such an additional tier would help to preserve the independence of the tiers.

f. *Product Quality Control.* The designation statute has absolutely nothing to do with public health or safety, quality control or proper labelling. Federal regulations already in place preclude labelling or adulteration problems at the distribution level. Brand-name liquor is typically bottled, sealed and labelled outside the state and then packed into cases and loaded into trucks or boxcars for shipment to California. During distribution, the bottle, the label and the seal may not be altered or tampered with. U.S. BATF Reg., 27 C.F.R. §§ 5.31, 194.251, 201.531, 201.550a, etc. Whether a distributor has been designated to import by a brand owner is irrelevant to product authenticity or quality, since all bottles bearing the brand label are identical in all respects.

g. *Ensuring Moral and Financial Integrity of Distributors.* To import liquor into California, one must

obtain a state license. The licensing statute and process requires a "thorough" investigation into the licensees' background as to matters "which may affect the public welfare and morals," as well as into matters of public convenience and necessity. Cal. Bus. & Prof. Code § 23958. This licensing system is of course administered by the state itself. All of the wholesaler Respondents already have the necessary state license(s) and have thus met the moral and financial qualifications prescribed by the state. The designation statute provides no such standards for the selection of importers and can add nothing to this licensing procedure other than the self-interest of the brand owners.

While A.B. 499 will inhibit price competition and help to entrench the position of the leaders of an already highly concentrated market, it serves no legitimate state regulatory goal, be it actual or constructive.

3. The Midcal Dictum

The balance struck by the state court between federal and state interests is reinforced by California Constitution Article XX, § 22, which expressly acknowledges that the state's power to regulate importation of liquor into California is "subject to the laws of the United States" enacted under the Commerce Clause. Any interest weighing analysis under *Midcal* must begin with the California Constitution's own acknowledgment of the preeminent federal power in this area. If a California statute regulating the importation of liquor is inconsistent with the Sherman Act, the federal statute must prevail even as a matter of California law. Even if California may control liquor importation under the Twenty-first Amendment, it has specifically waived this right in its own constitution in cases where such regulation is inconsistent with Federal law enacted under the Commerce Clause.

Despite its inconsistency with the Sherman Act and with the provisions of Article XX, § 22, Petitioners none-

theless maintain that A.B. 499 is saved from preemption by the Twenty-first Amendment. In making this contention they have seized upon the following dictum from the *Midcal* opinion:

> "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110, 63 L. Ed. 2d at 246.

Petitioners claim that the present case is distinguishable from *Midcal* because A.B. 499 purportedly concerns whether to permit importation and how to structure the distribution system, while the wine fair trade statutes invalidated in *Midcal* concerned some other aspect of regulation. In essence, Petitioners argue that the *Midcal* balancing test is not to be applied to statutes which in any way concern importation or distribution.

In interpreting this dictum, the California court believed that the reference to a state's "virtually complete control over *whether to permit importation or sale*" referred to the power of the state to prohibit the importation or sale of liquor *entirely*. 108 Cal.App.3d 348, 359, 166 Cal.Rptr. 563, 570. One of the primary purposes of the Twenty-first Amendment was to allow a state to remain dry if it so chose. 76 CONG. REC. 4141 (remarks of Sen. Blaine, sponsor of the amendment in the Senate).

Once a state has decided to allow the importation and sale of liquor by private parties, the Twenty-first Amendment cannot justify a privately administered system of exclusion which furthers no legitimate state regulatory purpose. The Twenty-first Amendment is directed at guaranteeing the *state* a place in regulating interstate commerce in liquor.[18] The present case involves not the state

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[18]Petitioners mistakenly rely on *Heublein, Inc. v. S. Carolina Tax Cmsn.*, 409 U.S. 275 (1972) to suggest that the Twenty-first

itself as a regulator but a private system of regulation, which is unsupervised by the state. See below, pp. 32 and 33.

Neither can A.B. 499 be defended as an attempt to "structure the liquor distribution system." This language in *Midcal* obviously reconfirms that a state has the power to adopt such "structures" as a state monopoly, *see, Midcal,* 445 U.S. at 1061, n.9, or a three-tier system. The principal claim that A.B. 499 is "structural" in nature is that it is designed to preserve the three-tier system. While the three-tier requirement, which exists in California law independently of A.B. 499, is obviously directed at "structure," A.B. 499 has nothing to do with the three-tier requirement, as explained above.

Petitioners maintain that a private device for excluding some wholesalers is itself a "structure" and thus immune from antitrust law. If the term "structure" is interpreted this broadly, then nearly every aspect of liquor distribution would be immune from the antitrust laws. For example, if "structure" can refer to the exclusion of some wholesalers by designation, it could just as easily include a state law authorizing exclusion of wholesalers by a group boycott agreement between distillers. "Structure" as used in *Midcal* must certainly refer not to private exclusionary devices against wholesalers, but to more overriding structural issues like whether wholesaling is to be in private hands at all or whether the state should prohibit all wholesalers from importing.

Amendment validates far greater restrictions on importation than are at issue here. The South Carolina statute there provided that only a manufacturer could import, but the case involved a tax issue rather than an antitrust challenge to the statute. In any event, it is one thing for the state itself to prohibit *all* wholesalers from importing, as in S. Carolina, and quite another for A.B. 499 to delegate to private parties the unsupervised power to exclude some wholesalers.

If the *Midcal* dictum indeed means that the *Midcal* preemption analysis does not apply to statutes pertaining to "structure" and "importation," as Petitioners interpret these terms, the dictum would swallow the holding in *Midcal*. Certainly, the fair trade statute in *Midcal*, which made it illegal to sell except at a specified price, was a measure affecting the structure of distribution in the broad sense in which Petitioners use the term. In fact, the *Midcal* opinion itself recognized that one of the principal *purported* purposes of the fair trade statutes (which they did not achieve) was to preserve a system of small retailers. *Midcal*, 445 U.S. at 113. Likewise, the wine price maintenance statutes invalidated in *Midcal* also regulated the terms of importation,[14] because these statutes empowered out-of-state suppliers of wine to control retail prices in California for their brands when imported into the state. Because *Midcal* itself dealt with a statute directed at certain aspects of distribution and importation, it is readily apparent that Petitioners' reading of the *Midcal* dictum is far too expansive.

4. The State Action Exemption

Having dealt with the Twenty-first Amendment, the court below proceeded to the issue of whether A.B. 499 was saved from preemption by the "state action exemption" to the antitrust laws. *Midcal* held that this exemption would not be triggered unless there was some active supervision by the state with respect to the regulatory scheme. The A.B. 499 regulatory scheme, as held by the court below, cannot be construed to be such state action. The state has simply delegated regulation to private parties without providing any standards for the regulation of

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[14]Cal. Bus. & Prof. Code § 24867, required out-of-state brand owners of wine to "designate in writing one licensee who imports the brand of wine to make and file a fair trade contract . . . ." Although this section was not explicitly at issue in *Midcal*, it was in effect invalidated by *Midcal*.

competition and without overseeing or reviewing in any way the choices made by the private parties.[15]

Morgan v. Div. of Liquor Control, 1981-2 Trade Cases, ¶ 64,366 (2d Cir. 1981) and *New Motor Vehicle Bd. of Cal. v. Orin W. Fox Co.*, 439 U.S. 96 (1978) are distinguishable with respect to the applicability of the state action exemption. *Morgan* involved a statute where the state itself set certain uniform fixed percentage markups for liquor wholesalers and retailers. Such direct state action and control left no discretion to these private parties with respect to markup. In *New Motor Vehicle Bd.* the only power or prerogative granted to private parties was the right of an existing automobile franchisee to file a protest against new proposed franchise with a state board, which would review and rule on the protest in accordance with certain criteria stated in the statute. No such state involvement occurs with designation.

C. A.B. 499 Is Also Preempted by the Federal Alcohol Administration Act

Several additional independent federal grounds support the decision below. The result below may be affirmed on these grounds, even though they were not relied upon nor ruled upon by the court in its opinion below.

A.B. 499 is not only inconsistent with the Sherman Act but also inconsistent with and preempted by the unfair competition provisions of the Federal Alcohol Administra-

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[15]Petitioners argue that there is a possibility that such active supervision would be provided by the state in the future in the form of amplifying regulations. However, the Director of the California Department of ABC has already issued regulations pertaining to A.B. 499 (Appendix F to Wine & Spirits Wholesalers' Petition), and these regulations contained no provision for supervision or review by the state of the private designation agreements. Because there is no indication that the Director will issue further regulations and no requirement that he do so, this Court should not consider this purely hypothetical possibility of state supervision.

tion Act, § 5, 27 U.S.C. § 205, which prohibits any indirect requirement by a distiller that a retailer purchase from one wholesaler to the exclusion of another "if such person [distiller] engages in such practice to such an extent to . . . prevent transactions in interstate . . . commerce. . . ." A.B. 499 is inconsistent with this statute because it indirectly gives the distiller the power to prevent interstate transactions so as to require that retailers purchase its brand of distilled spirits only from designated wholesalers to the exclusion of like distilled spirits offered by non-designated wholesalers. Such an exclusion is illegal under § 205 if it is accomplished "by agreement or otherwise" and whether it is done "directly or indirectly."

This Court has made it clear that § 205 is remedial in nature and that accordingly its language should be given a "hospitable scope." *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957). The purpose of § 205 is to prevent practices analogous to antitrust violations, *Id.* at 25. While the federal statute is obviously intended to promote and protect free competition by prohibiting marketing arrangements which exclude competing importer wholesalers, A.B. 499 authorizes such exclusive arrangements. Because the state statute enables the distillers to require indirectly that the retailers purchase only from the designated importers by preventing interstate competition, and the federal statute prohibits any such requirement, there is an inescapable conflict between the two statutes. At the very least, § 205 indicates that, despite the Twenty-first Amendment, there is an express, preeminent[16] and direct federal interest in prohibiting exclusionary or anticompetitive practices in the interstate marketing of liquor.

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[16]Again, the state statute is not saved from preemption by the Twenty-first Amendment, particularly because this Court has already held that § 205 is a constitutional exercise by Congress of its powers under the commerce clause. *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172 (1939).

D. Deprivation of Due Process

Predictably, a private system of regulation like A.B. 499 tramples upon numerous constitutional guarantees. Because the present case was decided so soon after the *Midcal* decision and because it bears such a close resemblance to *Midcal*, the state court had strong reasons for anchoring its opinion solely in *Midcal*. However, the state court's opinion notes at several points the basic unfairness of allowing one group of businessmen to exclude their competitors. *See, e.g.*, 108 Cal. App. 3d 348, 356-358, 361, 166 Cal. Rptr. at 569, 570, 572. In this respect A.B. 499 denies both due process and equal protection of the law. As this Court recently noted in *Midcal*, the states cannot "insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection [citation] and due process . . .", *Id.* at 108 (citations omitted).

With respect to deprivation of due process, A.B. 499 delegates the power to regulate importation to distilling corporations who have their own selfish interests with respect to the licensing of importers. These private parties are granted a power which they would not have absent the statute, namely the power to prevent an importer properly licensed by the state from importing goods which that importer has legally obtained in another state. This power may be exercised simply by refusing to designate an importer as "authorized." The statute, moreover, provides for no supervision or control by the state over the distillers' exercise of this delegated power and provides no standards or criteria to circumscribe or guide the distillers in the exercise of the power. The state has thus given to private parties a virtual veto over its licensing process. It has also given one private party the power to prevent another private party from freely disposing of his own property.

If the power to license importers is to be delegated to the distillers, due process requires that it be delegated in

such a way as to protect prospective importers from arbitrary or capricious refusals to license. Since A.B. 499 superimposes a second tier of private licensing over the state's licensing process, the designation procedure should be subject to the same due process requirements otherwise applicable to the granting or revocation of liquor licenses. *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir. 1964), confirmed that due process applies to the granting or denying of liquor licenses. The statute violates due process in the following respects:

1. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court found a denial of due process in a statute which, like A.B. 499, delegates the power to license to private persons with a "substantial pecuniary interest" in the licensing process. *Id.* at 578-79.

2. A.B. 499 provides absolutely no regulatory criteria or standards to limit the private delegate in his exercise of the power to designate. A distiller is free under the statute to refuse to designate on arbitrary or capricious grounds.

3. The statute fails to require a hearing or opportunity for review or appeal for an aggrieved importer who has been refused designation.

E. Denial of Equal Protection

A.B. 499 is also invalid because it discriminates between two groups of licensed distilled spirits importers. The two groups involved, i.e., wholesalers who are designated to import by the distillers and those who are not, are functionally indistinguishable from a regulatory standpoint. Both have been licensed by the state to import and have thus already met the minimum standards required by the state for importers. The only distinction between the two groups is whether they are in the good graces of another private party. Nonetheless, A.B. 499 permits "designated" importers to import major brand liquor into the state while denying the same privilege to all other licensed importers.

This harsh line bears no relationship to an actual and legitimate legislative purpose.

This discrimination is so utterly devoid of any legitimate regulatory purpose that it cannot pass constitutional muster, even under the "rational basis" standard of review. The rational basis standard is not "toothless." *Trimble v. Gordon,* 430 U.S. 762, 767 (1977). In fact, in *Hornsby v. Allen, supra,* the rational basis standard was used to invalidate a similarly unfair liquor licensing statute. It is appropriate to invalidate a discrimination on the rational basis standard where, as here, no state regulatory interest has been found by the state courts.

Numerous courts have confronted the precise issue of whether statutory discrimination between franchisees (i.e., "designees") and non-franchisees violates equal protection. Applying the "rational basis" standard of review to statutes which prohibited non-franchisees from selling new cars, *Joyner v. Centre Motor Co.,* 192 Va. 627, 66 S.E.2d 469 (S. Ct. App. Va. 1951); *Nelsen v. Tilley,* 137 Neb. 327, 289 N.W. 388 (S. Ct. Neb. 1939); *Rebsamen Motor Co. v. Phillips,* 226 Ark. 146, 289 S.W.2d 170 (S. Ct. Ark. 1956), found that such statutes unconstitutionally bestowed a special privilege on one class of businessman. The statutes invalidated by these cases were functionally indistinguishable from § 23672: They all generally provided that a car dealer could not sell a new car of a particular brand unless he was designated as an authorized dealer of the brand-owner. Such legislation was intended to prevent independent dealers from buying surplus new cars from authorized dealers in other marketing areas and importing them into their own marketing area for sale at prices lower than those of authorized dealers. As noted in *Joyner,* the discrimination in such statutes had no regulatory purpose because it was impossible to maintain that the franchised dealers were in any way superior to the unenfranchised dealers in honesty or business ability.

F. Invalidity Under State Constitution

The state court noted that in view of its decision on federal antitrust and preemption grounds, it was not necessary for it to consider the Respondents' contentions that the statute was invalid under the California Constitution and indicated no view as to how it would resolve these issues. 108 Cal.App.3d 348, 362, 166 Cal.Rptr. 563, 573. In the event that this Court should disagree with the California court's preemption analysis, the proper disposition of this case would be to remand it to the state Court of Appeal for consideration of the other infirmities in the statute under the California State Constitution.[17]

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[17]Respondents attacked the statute under the California State constitutional provisions dealing with equal protection and due process. Respondents also contended that Art. XX, § 22 (quoted, p.1, *supra*) absolutely prohibits delegation by the state of regulatory power over liquor to private individuals. By providing that the state shall "have the exclusive right and power to regulate the importation" of liquor, the California Constitution prohibits any delegation, whether to individuals or municipalities of the power to regulate liquor importation. Recent California Supreme Court cases have found absolute prohibitions on delegations in much less specific language. *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 132 Cal.Rptr. 668, 553 P.2d 1140 (1976). The designation statute violates this absolute prohibition on delegation by granting to private parties the power to prevent an importer properly licensed by the state from importing goods which that importer has legally obtained in another state.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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Nos. 80-1012, 80-1030, and 80-1052

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,
Petitioner;
BOHEMIAN DISTRIBUTING COMPANY,
Petitioner;
WINE & SPIRITS WHOLESALERS OF CALIFORNIA,
Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

On Writ Of Certiorari To The Court Of Appeal, Third Appellate District, Of The State Of California

REPLY BRIEF OF PETITIONER BOHEMIAN DISTRIBUTING COMPANY

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PARTIES

The parties to the proceeding, in addition to petitioner, a California corporation and an intervenor below, are:

1. Baxter Rice, Director, Department of Alcoholic Beverage Control.

2. Wine & Spirits Wholesalers of California, a California corporation, another intervenor below.

3. Norman Williams Company, a California corporation; Schwab Distributing Company, Inc., a California corporation doing business as Gold Coast Wines & Spirits; Lewis-Westco & Co., a California corporation; Frederica Auldridge, doing business as South Bay Liquor; Green Cat Liquors, Inc., a California corporation; Ralph E. Pierce and Sharon L. Pierce, doing business as Texas Liquor House; and William Kirby Jr. and Shirley D. Kirby, doing business as House of Fine Spirits.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 80-1012, 80-1030, and 80-1052

BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,
Petitioner;
BOHEMIAN DISTRIBUTING COMPANY,
Petitioner;
WINE & SPIRITS WHOLESALERS OF CALIFORNIA,
Petitioner,

v.

NORMAN WILLIAMS COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal, Third Appellate District, of the State of California

REPLY BRIEF OF PETITIONER BOHEMIAN DISTRIBUTING COMPANY

ARGUMENT

I. A.B. 499 Does Not Conflict With The Sherman Act

Our opening brief argues that A.B. 499 facilitates intra-brand restraints that foster interbrand competition—the pro-competitive restraints approved in *Continental T.V., Inc.* v. *GTE Sylvania Corp.*, 433 U.S. 36 (1977). We also argue that A.B. 499 does not go beyond *GTE Sylvania* because restraints aided by A.B. 499 are voluntary and remain subject to Sherman Act scrutiny and sanction. *Cantor* v. *Detroit Edison Co.*, 428

U.S. 579, 592 (1976). Respondents argue that the restraints aided by A.B. 499 are different from the restraints approved in *GTE Sylvania* because in *GTE Sylvania* the restraints were imposed by a franchisor upon his franchisees, whereas A.B. 499 allows a distiller to restrain "legal" resales of liquor (Br. 17-20). According to respondents, when a restraint applies to merchandise "legally" acquired, the restraint should be declared illegal *per se.* (Br. 9-16).

When Respondents say that liquor is "legally" acquired they mean that the person who wants to import the liquor into California purchased it from a wholesaler in another state, e.g. Oklahoma, and that the Oklahoma wholesaler had purchased it from a distiller without any contractual prohibition against resale outside of Oklahoma. Since Oklahoma law was thought to forbid such territorial restraints, every sale of liquor by an Oklahoma wholesaler for delivery in California was a "legal" resale. Thus, what Respondents want to be declared *per se* illegal is a California statute that gives a distiller the same right to control the distribution of its liquor into California that the distiller would have been able to exercise by private contract with its customers outside California, but for Oklahoma law. The *per se* rule respondents advocate would not only deny to liquor customers in California the benefits of intra-brand restraints available in all other branches of commerce, but would have the anomalous result of judging a restraint by a harsher standard when aided by a state statute than when aided by judicial enforcement of a private contract. It is hard to imagine a category of conduct less suitable for *per se* condemnation. Cf. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10, 19-20 (1979).

Respondents give no reason why an intra-brand restraint imposed by statute should be judged more harshly than when imposed by contract. Respondents say, instead, that the Supreme Court of California has found as a "fact" that California's system of rules for the distribution of liquor restricts intra-brand competition without providing offsetting benefits (Br. 22). See *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 341, 579 P.2d 476 (1978). There are three reasons why *Rice* does not support respondents.

First, *Rice* was concerned with a system of resale price maintenance. Resale price maintenance has long been deemed unlawful *per se,* and findings with respect to it hardly govern other systems.

Second, there can be no "factual" findings about A.B. 499 when that statute has yet to be placed into effect. Indeed, *Rice* was decided the year before A.B. 499 was enacted.

Third, even if *Rice* stands for what respondents think it stands for, it does not bind this Court in considering the meaning of the Sherman Act, a federal statute. A statute such as A.B. 499 could not be unlawful *per se* in California, lawful *per se* in New York, and subject to the Rule of Reason in Minnesota, with the difference depending on "factual" asides in opinions of state courts. See *Minnesota* v. *Clover Leaf Creamery Co.,* 499 U.S. 456, xxx n.6 (1981) (holding the Supreme Court not bound by purported "factual" finding of a state's supreme court that a state statute served no significant purpose).[1]

II. Respondents' Additional Arguments in Support of the Judgment are not Sufficient to Support It

Respondents offer a number of arguments that were made in, but not passed on by, the Court of Appeal. These arguments are properly before the Court because "the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.,* 434 U.S. 159, 166 n.8 (1977). Respondents' arguments, if not dispatched now, could unduly prolong this litigation on remand, and we therefore believe that the Court should address them.

---

[1] Respondents add factual assertions of their own, citing statements in a magazine and in respondents' exhibits (Br. 4-5, 20-21, 25). For example, respondents imply that no liquor retailer in California can benefit from point-of-sales services furnished by a wholesaler in California (Br.20). There has been no trial in this case or other factual determination. Respondents avoided any factfinding by seeking a mandate directly from a California appellate court. Respondents assertions of "fact" therefore must be disregarded.

A. Section 205 of the FAAA does not preempt A.B. 499

Respondents rely (Br. 33-34) on Section 205 of the Federal Alcohol Administration Act (the FAAA), which forbids a

> distiller . . . [t]o require, by agreement or otherwise, that any retailer . . . of distilled spirits . . . purchase any such products from any such person to the exclusion in whole or in part of distilled spirits . . . offered for sale by other persons in interstate . . . commerce . . . if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate . . . commerce . . . .

27 U.S.C. §205(a)(1976).

Section 205(a) prohibits certain exclusive dealing arrangements; distiller *A* cannot sell to retailer *X* on condition that *X* refrain from purchasing spirits from distiller *B*, if such a prohibition would have the forbidden effect. Section 205 simply does not deal with state statutes such as A.B. 499. A distiller that designates a wholesaler under A.B. 499 does not insist that the wholesaler refrain from buying another distiller's products. Section 205 does not deal with the wholesale trade (the sole purview of A.B. 499) or with the number of firms to which a distiller must sell.

The Court has treated Section 205(a) as its words suggest: as a statute banning exclusive-dealing arrangements "analogous to those prohibited by the antitrust laws." *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 25-26 (1957), quoting from H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935). Respondents' approach, in contrast, would extend Section 205(a) far beyond its language to prohibit all intra-brand restraints—restraints of a sort compelled by the laws of many states and authorized by the laws of many laws of many more. As respondents construe the statute, any refusal to sell to any firm that seeks to buy would be unlawful, whether or not the distiller insisted that the customer not deal with other distillers.

It is unlikely that Congress intended, in 1935, to make such substantial inroads on state rules; if it had any such intent, surely it would have said so, yet respondents cite no legislative history to that effect.

At all events, even if Section 205(a) bears on arrangements of the sort contemplated by A.B. 499, it is necessary to consider the clause stipulating that the exclusive dealing contract is unlawful only if that would "prevent, deter, hinder, or restrict other persons from selling or offering for sale" other spirits. This clause tracks the analysis of *GTE Sylvania*. An exclusive dealing contract would be unlawful, under Section 205(a), only if it had anticompetitive effects in the liquor market by stifling opportunities of other distillers. Respondents do not contend that A.B. 499 stifles other distillers or forecloses their access to outlets, and the respondents therefore have not made out any claim under Section 205(a).

B. A.B. 499 does not violate the Equal Protection Clause

Respondents' claim that A.B. 499 impermissibly discriminates against them in favor of importers designated by distillers is also wide of the mark. State regulation is afforded great latitude when the alleged discrimination is between economic classes only, i.e., does not involve a suspect class such as race or gender, and if any set of facts supports it. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). The presumption in favor of validity is especially strong in the case of liquor regulation, because of the second section of the Twenty-first Amendment. See *California* v. *La Rue*, 409 U.S. 109 (1972), *reh. denied*, 410 U.S. 948 (1973); *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U.S. 35, *reh. denied*, 384 U.S. 967 (1966).

A.B. 499 meets the Equal Protection test because the "discrimination" against importation of non-designated branded liquor is supported by the fact that the statute will foster interbrand competition, for reasons spelled out in *GTE Sylvania* and pp. 11-15 of our opening brief. If the Court holds that A.B. 499 is consistent with the Sherman Act, that finding will entail a conclusion that the designation distinction drawn by the statute is not preposterous or irrational.

C. A.B. 499 does not violate the Due Process Clause

Respondents' argument (Br. 35-36) that A.B. 499 violates the Due Process Clause fares no better.[2] Respondents say that there is "basic unfairness [in] allowing one group of businessmen to exclude their competitors" (Br. 35), but this is a bald assertion of economic substantive due process of a sort long rejected. The Court has repeatedly sustained statutes that effectively exclude some competitors from the marketplace. See, e.g., *Clover Leaf Creamery, Co., supra; New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978); *Cleland* v. *National College of Business*, 435 U.S. 213, 215 n.6 (1978); *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Currin* v. *Wallace*, 306 U.S. 1, 16 (1939).

There is nothing unusual about A.B. 499 as an economic regulatory statute. It simply allows distillers to exercise a choice about the identity of the distributors of their products. Such choices—commonly enforced through the law of contracts and by terminations of buyers that will not adhere to contractual undertakings—are the routine business of business. A.B. 499 supports the ability of distillers to make and enforce such private choices for distribution in California where other states may have interfered with the ordinary contractual devices through which such choices are implemented. And although, as respondents emphasize, California has not promulgated standards to guide the private choices, there is no need for standards here any more than there is a need for standards in the law of contracts. A statute is constitutional even though it

[2] The Due Process Clause is not applicable to A.B. 499 at all unless the state's action deprives respondents of property. Respondents have not shown, or even argued, that the disappointment of their unilateral expectation to obtain spirits is a form of property. Cf. *Connecticut Board of Pardons* v. *Dumschat*, 101 S. Ct. 2460 (1981); *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980). We do not press this point, however, because as we show in the text respondents' argument fails even if A.B. 499 deprives them of "property".

has no purpose other than to enforce private choices; indeed, this is essentially all the law of property does.[3]

CONCLUSION

For the foregoing reasons, as well as those in our opening brief, the judgment of the Court of Appeal should be reversed.

Respectfully submitted.

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[3] Respondents' attempt to analogize A.B. 499 to a licensing statute, cf. *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), is therefore unpersuasive. The state does not attempt to pick and choose distributors on an arbitrary basis and to exclude certain of them from the business. It simply enforces private decisions about who will deal with whom.

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Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, etc., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District.

REPLY BRIEF OF PETITIONER WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN CASE NO. 80-1052.

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WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

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NORMAN WILLIAMS COMPANY, etc., *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN CASE NO. 80-1052.

Introduction.

In this Reply Brief, we discuss only matters raised in Respondents' Brief which were not addressed in the opening brief of Petitioner Wine & Spirits Wholesalers of California.

Preliminarily, we make four observations concerning Respondents' Brief:

1. Although in proceedings before the California Court of Appeal Respondents limited their challenge to the Designation Statute to the validity of the Statute *on its face*, they nevertheless made there (and repeat to this Court) numerous factual assertions, many of which were specifically controverted or were unsupported by competent evidence, or both. (*See e.g.*, Respondents' Brief at 2, 4, 5, 6, 20, 23.) The California Court of Appeal made no findings of

fact and specifically stated that it did not rely upon the largely irrelevant exhibits filed by Respondents in alleged support of their petition. *Norman Williams Company, et al. v. Baxter Rice,* 108 Cal. App. 3d 348, 352 (1980). Instead, the California court held that the Designation Statute, *adjudged on its face,* constitutes a *per se* violation of the Sherman Act and does not fall within either the state action exemption from the Act or the legislative jurisdiction of California under the Twenty-first Amendment. The issue before this Court is whether those lower court determinations were correct, without regard to the unsupported factual assertions made in Respondents' Brief.

2. Many of the arguments addressed by Respondents to this Court have no relevance to the issues at bench and are more appropriately addressed to the California Legislature. For example, Respondents assert that "the state . . . is certainly indifferent as a regulator to promoting new brands or old sluggish brands. . . ." (Respondents' Brief at 21.) Such matters were within the legislative jurisdiction of the California Legislature to resolve when A.B. 499 (the bill which amended the Designation Statute in 1979) was under consideration[1] and are open for reconsideration by the Legislature at any time.

3. Respondents' repeated assertion that "the California courts" have determined that the Designation Statute "serves no legitimate regulatory goal related to liquor" (Respondents' Brief at 8, 24) is inaccurate in two respects.

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[1]Arguments of this kind doubtless were made to the Legislature when A.B. 499 was under consideration. The bill was opposed at various stages by Respondent Norman-Williams, Inc., Amicus Curiae Consumers Union and others. (J.A. 57, 63, 72; Consumers Union Brief at 3.) The California Senate vote on A.B. 499 was 21 in favor and 8 opposed, and the California Assembly vote on the bill was 49 in favor and 15 opposed. (J.A. 71.)

First, only *one* California court—the court below—has construed the Designation Statute. *Second*, the Court of Appeal chose to ignore entirely one of the most important state interests served by the Designation Statute: support of the business judgment of those distillers and brand owners who choose to adopt California marketing plans for their products based on vertical allocation of the wholesale market. The business justification for these marketing decisions and their beneficial effect on interbrand competition were recognized by this Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*"), and are compellingly demonstrated in the Briefs of Bohemian Distributing Company (at 11-15) and Amicus Curiae on behalf of Wine & Spirits Wholesalers of America, Inc. and National Beer Wholesalers Association of America, Inc. (at 5-10).

4. Respondents' several assertions that the Designation Statute grants or delegates to private parties "unlimited power" to "prohibit" trade among other private parties or to "exclude them from the market" (*e.g.*, Respondents' Brief at 7, 8, 10, 14, 15, 19, 31, 35) are wide of the mark. The Designation Statute does not empower distillers or brand owners to select a limited number of wholesalers to handle their products; the distillers and brand owners were free to do that before the Designation Statute was enacted. All that the Designation Statute does—*and does through state action, not private action*—is prevent third parties from interfering with a brand owner's selection of the wholesale distributors for his product in California.

ARGUMENT.

A. RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT THE DESIGNATION STATUTE VIOLATES THE SHERMAN ACT.

1. The Designation Statute Does Not Violate the Sherman Act Because It Does Not Require or Authorize Contracts, Combinations or Conspiracies in Restraint of Trade.

Amicus Curiae Heublein, Inc. perceptively identifies a fundamental flaw in the California Court of Appeal's antitrust analysis; *i.e.*, failure to recognize that the Designation Statute does not violate the Sherman Act because it neither requires nor authorizes private parties to contract, combine or conspire in restraint of trade. (Heublein Brief at 4-7.)

By its express terms, Section 1 of the Sherman Act proscribes only a "contract, combination . . ., or conspiracy in restraint of trade or commerce." 15 U.S.C. § 1. Accordingly, proof of a contract, combination or conspiracy is *essential* to the establishment of a violation of the statute. *Weir v. Chicago Plastering Institute*, 272 F.2d 883, 887 (7th Cir. 1959). *Compare Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). *See also* 16A *Business Organizations*, Von Kalinowski, *Antitrust Laws and Trade Regulation* § 6.01[1], [2], [3] at 6-2 - 6-54 (1981), and cases cited therein.

None of the cases cited by Respondents—all of which involve state-sanctioned private *price-fixing* arrangements —purport to dispense with the requirement of a contract,

combination or conspiracy. (Respondents' Brief at 10-11.)[2] The issue was not presented by the parties, much less decided by this Court in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*").[3] Since *Midcal*, two decisions have expressly reaffirmed that a state statute which neither requires nor authorizes private contracts, combinations or conspiracies in restraint of trade does not contravene the Sherman Act. *See Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981); *United States Brewers Ass'n., Inc. v. Healy*, 1982-1 Trade Cases ¶ 64,550 at 73,012 (D.Conn. 1982).

In attempted response to Amicus Curiae Heublein, Respondents contend that what they term a brand owner's designation agreement[4] "*should be deemed* to supply the element of 'a combination' or 'contract'. . . ." (Respondents' Brief at 11 (emphasis added).) However, Respondents also state that "it is the distiller's refusal to designate which causes the exclusion [of nondesignated importers] rather than the distiller's designation agreements. . . ." (*Id.*)

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[2]Respondents argue that the contract, combination or conspiracy element of a Sherman Act violation is "deemed to exist in a tying violation . . ." and therefore should be deemed to exist in the case of the Designation Statute. (Respondents' Brief at 11.) They are wrong. "To establish a tying arrangement violative of § 1 of the Sherman Act . . . the plaintiff *must first prove an agreement or understanding between the seller and the buyer* conditioning the seller's sale of one product upon the buyer's purchase of another." *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 708 (7th Cir. 1978), *cert. denied*, 439 U.S. 822 (1978) (emphasis added). The existence of the requisite agreement is a question of fact. 567 F.2d at 709.

[3]The California statute at issue in *Midcal* provided for fixing of resale prices by contract as well as through posting of prices by wine producers.

[4]Respondents' frequent reference to "designation agreements" is erroneous. The Designation Statute does not speak in terms of "agreements" but of unilateral action by distillers, and no such agreements are shown in the record.

Respondents alternatively argue that "the element of combination required in Sherman Act § 1 *may be deemed to exist* in the present case by virtue of the State's cooperation in enforcing the exclusions made by the distillers." (Respondents' Brief at 11-12 n.4 (emphasis added).) The holding in *Parker v. Brown*, 317 U.S. 341 (1943), the case relied upon by Respondents, is *directly* to the contrary: a state makes "no agreement and enter[s] into no conspiracy in restraint of trade" merely by adopting and enforcing a regulatory program, "but, as sovereign, impose[s] the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

Because the Designation Statute neither compels nor authorizes private parties to contract, combine or conspire in restraint of trade, the Statute does not violate the Sherman Act. Furthermore, as we have pointed out in our opening brief, the Statute is also valid under the Sherman Act pursuant to the principles applied in *GTE Sylvania*.

2. The Designation Statute Does Not Sanction Group Boycotts in Violation of the Sherman Act.

In an effort to fit the Designation Statute within the confines of a purported *per se* violation of the Sherman Act, Respondents seize upon a series of cases dealing with concerted refusals to deal with other traders (referred to herein as "group boycotts") and assert that the so-called "exclusionary practice" authorized by the Designation Statute is "analogous" to the practices held illegal in those cases. (Respondents' Brief at 13-14.) The purported analogy is untenable. The Designation Statute contemplates *unilateral* action by distillers; it neither requires nor authorizes the type of collaborative conduct that constitutes a group boycott. Moreover, Respondents have confused group boycotts, which in certain contexts are *per se* illegal, with purely

vertical marketing arrangements, which are subject to the rule of reason.[5]

Vertical marketing arrangements unilaterally initiated and arranged by a producer of goods are distinguishable from group boycotts in both purpose and effect. "[T]he hallmark of the 'group boycott' is the effort of competitors to 'barricade themselves from competition *at their own level*'." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978) (citation omitted) (emphasis added); *accord, Phil Tolkan Datsun, Inc. v. The Greater Milwaukee Datsun Dealers Advertising Ass'n., Inc.*, 1982-1 Trade Cases ¶ 64,579 at 73,180 (7th Cir. 1982). Those group boycotts which have been held to violate the Sherman Act manifestly served no purpose other than to eliminate competition. *See Larry V. Muko, Inc. v. Southwestern Penn. Bldg. & Const. Trades Council*, 1982-1 Trade Cases ¶ 64,505 at 72,794 - 72,796 (3d Cir. 1982); *Smith v. Pro Football, Inc., supra*, 593 F.2d at 1178-81, and cases cited therein. In contrast, vertical marketing arrangements are promotive of interbrand competition. (*See GTE Sylvania* and discussion in the Briefs of Petitioner Bohemian Distributing Company (at 11-15) and Amicus Curiae on behalf of Wine & Spirits Wholesalers of America and National Beer Wholesalers Association of America, Inc. (at 5-10).) Furthermore, there is no evidence that either distillers or designated wholesalers have com-

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[5]Not all types of group boycotts are *per se* illegal. *See Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1383 (9th Cir.), *cert. denied*, 102 S.Ct. 128 (1981); *United States Trotting Ass'n. v. Chicago Downs Ass'n., Inc.*, 665 F.2d 781, 788 (7th Cir. 1981) (*en banc*); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1365-69 (5th Cir. 1980). It is unnecessary for the Court to decide in the present case the parameters of the *per se* rule in the context of group boycotts since the Designation Statute does not compel or authorize a group boycott and none is shown in the record.

bined to exclude non-designated wholesalers from the California wholesale market.

The three group boycott cases relied upon by Respondents clearly have no bearing on the present case. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Court concluded that the by-laws of Associated Press, an association of more than 1200 newspapers, were unreasonable insofar as they gave each member the power to prevent its non-member competitors from joining the association. 326 U.S. at 14-19. The *Associated Press* case involved a purely horizontal combination of competitors. Nothing in the Designation Statute gives one wholesaler the right to exclude another from a source of supply.

In *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), also relied upon by Respondents, Broadway-Hale, a major department store chain, induced ten national manufacturers of household appliances and their distributors to refuse to sell to a competitor department store or to sell to it only at discriminatory prices and on highly unfavorable terms. The case is wholly distinguishable because that restraint involved concerted anticompetitive action at the manufacturer, wholesaler and retailer levels and was initiated by a retailer for the purpose of eliminating a competitor. In holding that the combination constituted an illegal group boycott, the Court emphasized that it was not faced with "the case of a single trader refusing to deal with another, or even of a manufacturer and a dealer agreeing to an exclusive dealership. Alleged in [the Klor's] complaint is a wide combination consisting of manufacturers, distributors and a retailer." 359 U.S. at 212.

United States v. General Motors Corp., 384 U.S. 127 (1966), is equally inapposite. As in *Klor's*, the manufacturer did not make an independent marketing decision designed to improve its competitive position. Instead, it par-

ticipated in a conspiracy initiated by dealers to eliminate *their* competition. The Court condemned the conspiracy as one involving elimination of competitors by "joint collaborative action." 384 U.S. at 145.

In *GTE Sylvania*, the Court distinguished vertical marketing arrangements from the type of practices proscribed in the *General Motors* case:

> There may be occasional problems in differentiating vertical restrictions from *horizontal restrictions originating in agreements among the retailers*. There is no doubt that restrictions in the latter category would be illegal *per se*, see, e.g., *United States v. General Motors Corp.*, . . . but we do not regard the problems of proof as sufficiently great to justify a *per se* rule.

433 U.S. at 58 n.28 (emphasis added).

A number of cases decided since *GTE Sylvania* have emphasized the distinction between purely vertical marketing arrangements and situations in which one or more dealers enlist the aid of a common supplier in a conspiracy to cut off supplies to the dealers' competitors. The critical distinction between the two types of cases is clearly articulated in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979):

> When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself,

a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.

Accord, Battle v. The Lubrizol Corp., 1982-1 Trade Cases ¶ 64,576 at 73,156 (8th Cir. 1982); *Com-Tel, Inc. v. Dukane Corp.*, 1982-1 Trade Cases ¶ 64,504 at 72,785 (6th Cir. 1982); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., supra,* 637 F.2d at 1385; *Blankenship v. Herzfeld,* 661 F.2d 840, 844 (10th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir.), *cert. denied,* 102 S. Ct. 324 (1981).

Clearly, the Designation Statute does not authorize group boycotts or conduct analogous to group boycotts.

3. It Is Immaterial That the Designation Statute Precludes Purchases by Nondesignated Importers Rather Than Sales to Such Importers by Out-of-State Wholesalers.

Respondents concede that under *GTE Sylvania,* the rule of reason "may well allow a distiller to prohibit his own franchisee from reselling his brand to a third party in another state." (Respondents' Brief at 17 (emphasis deleted).) They contend, however, that when the distiller has not restricted resale of products sold to a distributor, the distiller may not "reassert control" over such products by precluding third parties from acquiring them. They also assert that a distiller's sole method of achieving vertical allocation is to bind his out-of-state distributors, contractually, not to sell to California wholesalers and enforce that restriction by refusing to sell to a distributor who breaches his contract. (*Id.* at 17-18.) Both contentions are wrong.

The first contention is wrong because a distiller who declines to designate a California importer to carry his brand does not thereby "reassert control" over products sold to an Oklahoma (or other) wholesaler. Indeed, the distiller does not act at all; it is the Designation Statute that prohibits

importation by a non-designated wholesaler. Respondents' second contention is wrong because when an Oklahoma or other wholesaler may be contractually prohibited from reselling to nondesignated California importers, consistently with *GTE Sylvania*, the antitrust laws do not rigidly limit the means of enforcing the restriction to termination of a wholesaler who breaches the contract.[6] *GTE Sylvania* expressly declined to hold that the applicability of the rule of reason would turn on the degree or form of the restriction imposed.[7] *GTE Sylvania*, 433 U.S. at 58 n.29.

B. ARTICLE XX, SECTION 22 OF THE CALIFORNIA CONSTITUTION IS IRRELEVANT TO THE ISSUES IN THIS CASE.

Respondents state that "California Constitution, Article XX, Section 22, . . . expressly acknowledges that the state's power to regulate importation of liquor into California is 'subject to the laws of the United States' enacted under the Commerce Clause." (Respondents' Brief at 29.) The meaning of Respondents' statement is unclear to Petitioner. How-

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[6]Nor is it true, as implicitly asserted by Respondents, that a brand owner has no remedy against a nondesignated California wholesaler who acquires the brand owner's products in violation of an agreement between the brand owner and his franchisee. (*See* Respondents' Brief at 15-16.) The courts have long recognized that injunctive relief will lie against a third party for inducing breach of a lawful contract. *See, e.g., Bitterman v. Louisville & Nashville Rd. Co.*, 207 U.S. 205, 222-23 (1907); *Engine Specialties v. Bombardier, Ltd.*, 330 F.Supp. 762, 768 (D. Mass. 1971), *aff'd.*, 454 F.2d 527 (1st Cir. 1972); 43A C.J.S. *Injunctions* § 105 (1978).

[7]Respondents incorrectly cite *Adolph Coors Co. v. A & S Wholesalers*, 561 F.2d 807 (10th Cir. 1977), as holding that an injunction which prohibited a non-franchisee from transporting Coors beer in violation of the brewer's territorial restrictions was wrongful. In fact, the injunction in question was dissolved *by the trial court* in reliance on *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). After *Schwinn* was overruled in *GTE Sylvania*, the Court of Appeals remanded to the District Court, for reconsideration in light of *GTE Sylvania*, the issue whether Coors was liable for procuring an allegedly wrongful injunction. 561 F.2d at 814.

ever, Respondents are obviously wrong if they mean to assert that by reason of this provision of the California Constitution, the laws of the United States applicable to intoxicating liquor, including the Sherman Act, are to be given a wider scope and effect in California than those laws would otherwise have.

Article XX, Section 22, of the California Constitution ("Section 22") was enacted by an initiative measure adopted by the people of California in anticipation of the repeal of the Eighteenth Amendment. Its first paragraph provides in relevant part:

> The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from this State, of alcoholic beverages. . . .

The primary purpose of Section 22 was to allocate to the state government of California the sole power to regulate alcoholic beverages, which otherwise would have been subject to regulation in part by chartered cities pursuant to Article XI, Section 6 of the California Constitution. *See Sandelin v. Collins*, 1 Cal. 2d 147, 151-53, 33 P.2d 1009 (1934); *cf. Ainsworth v. Bryant*, 34 Cal. 2d 465, 211 P.2d 564 (1949); *Compare Los Angeles Brewing Co. v. City of Los Angeles*, 8 Cal. App. 2d 379, 390, 48 P.2d 65 (1935), *with Los Angeles Brewing Co. v. City of Los Angeles*, 8 Cal. App. 2d 391, 397, 48 P.2d 71 (1935). To express the intention that, within California, the state government alone is to have broad regulatory powers with respect to alcoholic

beverages, the drafters of Section 22 provided that the State "shall have the *exclusive right and power*" to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquors within the State and to regulate the importation into and exportation from the State of intoxicating liquor. (emphasis added.) Then, to make it clear that California was not, by this language, purporting to arrogate to itself the right and power to regulate intoxicating liquors *to the extent that they would be subject to regulation by the federal government to the exclusion of the several States after repeal of the Eighteenth Amendment*, the drafters included the following two phrases: (1) "subject to the internal revenue laws of the United States" and (2) "subject to the laws of the United States regulating commerce between foreign nations and among the states."

There is nothing to indicate that the drafters of Section 22—or the people of California in adopting that provision of the California Constitution—intended by the second "subject to" clause to yield to federal law any scope that it would not otherwise have had within our federal system after the adoption of the Twenty-first Amendment. The decisions of the California Courts confirm that California has the same broad authority as other States over intoxicating liquor. *Allied Properties v. Dept. of Alcoholic Beverage Control*, 54 Cal. 2d 141, 147, 346 P.2d 737 (1959) ("A state has particularly wide powers with respect to the manufacture of and traffic in alcoholic beverages. . . . The same broad powers are recognized in section 22 of article XX of the California Constitution."); *accord, Sandelin v. Collins, supra*, 1 Cal. 2d at 153.

It follows, therefore, that Section 22 has no bearing on the issues before this Court.

C. THE FEDERAL ALCOHOL ADMINISTRATION ACT DOES NOT PREEMPT THE DESIGNATION STATUTE.

Respondents contend that the Designation Statute is preempted by Section 5 of the Federal Alcohol Administration Act (27 U.S.C. § 205) ("Section 5") "because [the Statute] indirectly gives the distiller the power to prevent interstate transactions so as to require that retailers purchase its brand of distilled spirits only from designated wholesalers to the exclusion of like distilled spirits offered by non-designated wholesalers." (Respondents' Brief at 34.)

Respondents misread the federal statute. Section 5 makes it unlawful, *inter alia*, "for any person engaged in business as a distiller . . . of distilled spirits . . . to require . . . that any *retailer* . . . purchase any such products *from such person* to the exclusion . . . of distilled spirits . . . sold or offered for sale *by other persons* in interstate or foreign commerce, if [certain conditions are met]. . . ." (emphasis added.) The statute does not apply to this case for two reasons:

1. Section 5 only precludes a distiller from requiring that a *retailer* purchase from the *distiller* ("such person") to the exclusion of others.[8] Under California's three-tier distribution system, out-of-state distillers may not sell to retailers; hence, a distiller would never have occasion to require a retailer to purchase the distiller's products from him to the exclusion of others.

2. Section 5 applies only in a situation where a retailer is required by a distiller to purchase his product to the exclusion of the product *of another distiller* ("distilled spir-

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[8]The legislative history of Section 5 confirms that the statute is intended only to preclude "exclusive purchase arrangements with retailers" so as to prevent "monopolistic control" over them. H.R. Report No. 1542, 74th Cong., 1st Sess. 11; Sen. Report No. 1215, 74th Cong., 1st Sess. 6-7.

its sold . . . by other persons''); the statute has no application to a situation where a retailer is required to purchase *the distiller's own product* from the distiller himself (in a state where such purchases are permitted) rather than from another source.

In effect, Respondents would have the Court construe Section 5 as though it not only applied to purchasers at the wholesale level but also required *all* distillers to sell to *all* wholesalers. This construction, if adopted, would impose a federal, Oklahoma-style ''open wholesaling law'' upon every state. No one has heretofore suggested that Section 5 is intended thus to intrude on the several States' right to determine the structure of their liquor distribution systems.

D. THE DESIGNATION STATUTE DOES NOT DENY NON-DESIGNATED WHOLESALERS DUE PROCESS OF LAW.

Building on their mistaken notion that the Designation Statute grants or delegates to distillers the ''power'' to ''exclude their competitors'' (Respondents' Brief at 35), Respondents contend that the Statute ''superimposes a second tier of private licensing over the state's licensing process . . . [and] should be subject to the same due process requirements otherwise applicable to the granting or revocation of liquor licenses.'' (*Id.* at 36.) Starting with a false premise, Respondents have reached an equally erroneous conclusion.

When California licenses a person or business entity to import liquor and distribute it at the wholesale level, the State does not guarantee that any distiller will elect to use the licensee's services to distribute the distiller's products—any more than the State guarantees clients to licensed lawyers, patients to licensed doctors, or patrons to licensed retail liquor stores. The license merely *authorizes* the licensee to import and distribute alcoholic beverages. Whether

a particular distiller selects a particular licensee, as against any other, to be a participant in the distiller's California distribution system is a private business decision. Brand owners of products have the inherent right to select and limit the importer-distributors to whom they will sell their own products. *United States v. Colgate*, 250 U.S. 300, 307 (1919). The Designation Statute simply facilitates the exercise of this right.

The Statute's restriction upon nondesignated importers is imposed by the Legislature, not by the brand owner. That the application of this restriction is occasioned by the private *inaction* (nondesignation) of the brand owner does not transform his nonaction into a "licensing decision." The present case is analogous to *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), wherein this Court, reviewing the provision of an Illinois fair trade statute making prices set in a contract between two parties binding on third persons, found nothing that would "justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others. . . ." 299 U.S. at 194. *See also Scovill Manufacturing Co. v. Skaggs Pay Less Drug Stores*, 45 Cal. 2d 881, 888, 291 P.2d 936 (1955).

In addition to the fact that the Designation Statute does not delegate any licensing authority to distillers, Respondents' argument also fails under the principles discussed and applied in *Board of Regents v. Roth*, 408 U.S. 564 (1972). There, this Court held that Roth, a university assistant professor who had been hired for one year, was not entitled to a hearing when the university declined to rehire him for the next year. The Court reasoned that, the university's decision did not deprive Roth of any "liberty" or "property" interest protected by the Fourteenth Amendment. The Court recognized that Roth's right to "liberty"

would have been implicated, and a hearing required, if the university's refusal to rehire him had impugned his good name, reputation, honor or integrity, had imposed on him a stigma, or had foreclosed him from obtaining another job. However, the Court held that a person is not deprived of "liberty" when "he simply is not rehired in one job but remains as free as before to seek another." 408 U.S. at 575 (citation omitted). Turning to Roth's alleged deprivation of a "property interest," the Court held that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. The Court also held that "property interests" which are entitled to Fourteenth Amendment protection "are not created by the Constitution . . . [but] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Ibid.* Since the university's rules made no provision for rehiring persons hired for one year, the Court found that Roth did not have a property interest sufficient to require a hearing.

Roth would be fully applicable to a situation in which a distiller declined to designate a particular California wholesaler to import the distiller's products. No property interest of the wholesaler would be infringed because the issuance of a California importer's license does not guarantee anyone's patronage to the licensee. Thus, the wholesaler would have, at most, an "abstract need or desire" to be designated. He clearly would not have a justifiable "unilateral expectation" of being designated. *A fortiori*, he would not have a "legitimate claim of entitlement" to be included within the distiller's distribution network. Nor would nondesignation deprive the wholesaler of a protected "liberty" because nondesignation would not damage his good name,

reputation, honor or integrity, impose on him any stigma, or foreclose him from obtaining a designation from other distillers.

E. THE DESIGNATION STATUTE DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

Respondents contend that the Designation Statute denies undesignated wholesalers equal protection of the laws because it "discriminates between two groups of licensed distilled spirits importers," that are allegedly "functionally indistinguishable from a regulatory standpoint." (Respondents' Brief at 36.) Respondents also argue that the classification drawn by the Statute "bears no relationship to an actual and legitimate legislative purpose." (*Id.* at 37.) These contentions are without merit.

The Designation Statute is an economic regulation. It is settled that the appropriate standard under the Equal Protection Clause of the Fourteenth Amendment for reviewing such a statute is whether the statute bears a rational relationship to a conceivable legitimate state purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), and cases cited therein.

Rationality of Relationship. Because a principal purpose of the Designation Statute is to facilitate a distiller's business decision to effect a vertical allocation of the California wholesale market for his product, the Statute's differentiation between designated and nondesignated importers is not only rational—it is essential to achievement of this legislative objective.[9]

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[9]A party who challenges a legislative classification has a heavy burden in attempting to establish that the distinction is not rationally related to the statute's purpose. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Minnesota v. Clover Leaf Creamery Co., supra,* 449 U.S. at 464 (citations omitted). Respondents' burden has not been carried in this case.

Legitimacy of State Purpose. As we have previously shown (see discussion at 7, 9-10, *supra*), there is ample economic justification for the vertical allocation of wholesale markets. Moreover, this Court has consistently held, in dealing with the legitimacy of state purposes in economic equal protection cases, that it is inappropriate for the judiciary "to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made . . . in the local economic sphere." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). There is a presumption in favor of state economic legislation, applicable to both the legitimacy of the state's interest (*see Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Olsen v. Nebraska*, 313 U.S. 236 (1941)), and the rationality of the legislation as a means of achieving the state's objectives (*Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at 464; *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

In addition, the case for upholding the Designation Statute "is undoubtedly strengthened" and the Statute enjoys an "added presumption in favor of . . . validity" by reason of the Twenty-first Amendment. *California v. La Rue*, 409 U.S. 109, 115, 118 (1972). *See also, Craig v. Boren*, 429 U.S. 190 (1976) (state economic regulations of alcoholic beverages "traditionally merit only the mildest review under the Fourteenth Amendment." 429 U.S. at 207 (citations omitted).

Conclusion.

For the reasons set forth above and in Petitioner's opening brief, it is respectfully submitted that the Judgment below should be reversed.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF RESPONDENTS

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THIRD APPELLATE DISTRICT

BRIEF AMICUS CURIAE OF CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF RESPONDENTS

Consumers Union of United States, Inc. ("Consumers Union") submits this brief as amicus curiae in support of Respondents[1]/ with the written consent of all parties, pursuant to Rule 36.2 of this Court.

INTEREST OF AMICUS CURIAE

Consumers Union is a nonprofit, membership organization chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union publishes Consumer Reports, a monthly magazine with a circulation of over 2.9 million, which regularly carries articles rating products that Consumers Union has tested,

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1/ Unless otherwise indicated, references in this brief to "Respondents" are to non-franchised wholesalers, although some liquor retailers are Respondents in this case.

as well as articles on consumer services, marketplace economics and judicial actions that affect consumer welfare. Approximately 300,000 residents of California subscribe to Consumer Reports.

Consumers Union in no way supports increased alcohol consumption, but has long opposed laws which restrict competition in consumer goods. Since early 1977, the West Coast Regional Office of Consumers Union has been an active participant in California in both litigation and legislative debate concerning the pricing and distribution of alcoholic beverages. Attorneys representing Consumers Union sought and were granted leave to appear as amicus curiae in Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 579 P.2d 476, 146 Cal.Rptr. 585 (1978) and California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

Consumers Union strongly opposed amending Business and Professions Code § 23672 (the "designation statute"), which is at issue here, when the California Legislature considered the amendment in 1979. We argued then and maintain now that the designation statute is unsound as a matter of public policy and will not encourage temperance or further any other state interest. We agree with Respondents that the measure is also inconsistent with and preempted by the federal antitrust laws, violative of the due process and equal protection clauses of both the United States and California Constitutions, and is an unlawful delegation of legislative power. In addition, the designation statute will impose a substantial cost on California consumers in the form of higher prices for distilled spirits.

STATEMENT

The court below found the designation statute invalid because it conflicts with and is preempted by the Sherman Act. The portion of the statute which the court found invalid provides:

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Business and Professions Code § 23672 (West's Supp., 1981).

SUMMARY OF ARGUMENT

The designation statute would eliminate competition at the wholesale level by prohibiting Respondents from importing nationally advertised brands of distilled spirits, which account for 90% of the distilled spirits consumed in California. Eliminating this competition

will cause a substantial increase in the amount of money California consumers spend on distilled spirits, but will have no dampening effect on consumption.

The anti-competitive effects of the designation statute clearly conflict with the federal antitrust laws. Since, as the court below found, the designation statute serves no state interest, it cannot be immune from federal antitrust laws under the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943), and its progeny. When California's interest in the designation statute (which was enacted under the grant of power contained in the Twenty-First Amendment), is weighed against the federal interest in the Sherman Act (which is coextensive with Congress' broad power to regulate commerce), the balance tips in

favor of the federal antitrust laws, thus preempting the designation statute.

The designation statute is also invalid on a number of state grounds which the court below did not explicitly rely on.

ARGUMENT

Petitioner Wine & Spirits Wholesalers of California ("WSWC") has described the situation resulting from the decision of the court below as follows:

> 1) the number of potential sources of supply for a particular brand has increased due to the addition of Oklahoma wholesalers and potential suppliers from other states,
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> 2) any and all California importers may acquire any brand of distilled spirits, and
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> 3) the location and identity of the importers of a particular brand are subject to monetary (sic) change. Brief of Petitioner WSWC at 36.

Consumers Union finds this a particularly apt description of a competitive market which has led to substantial benefits for consumers. Competition within the distilled spirits market in California at the wholesale level is at stake in this case. Because the designation statute has been held invalid, Respondents are able to import distilled spirits and sell them to retailers for less than the brand owners' suggested prices, which the franchised wholesalers adhere to. Norman Williams v. Rice, 108 Cal.App.3d 348, 353; 166 Cal.Rptr. 563, 567 (1980). The designation statute would prohibit Respondents from importing distilled spirits, thus eliminating the only meaningful form of competition at the wholesale level. Eliminating wholesale competition will certainly cause retail prices to rise, but will have no effect on the

amount of alcohol consumed, as both this Court and the California Supreme Court have recognized. Midcal, 445 U.S. at 113; Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 146 Cal.Rptr. 585, 603 (1978).

The savings for consumers at stake in this case are staggering. In 1978, Californians consumed 20,936,126 cases of distilled spirits. J.A. 32. According to the prices posted with the California Department of Alocholic Beverage Control by Berberian Bros., Inc., a designated wholesaler, and Norman Williams Co., one of the Respondents, the designated wholesaler was charging retailers nearly $16.00 more per case for Johnnie Walker Red Label Scotch Whiskey and nearly $20.00 more per case for Johnnie Walker Black

Label Whiskey, in October, 1979.2/ These figures indicate potential savings to California consumers of approximately $1.25 to $1.50 per bottle. Some reports have placed the per bottle savings to

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2/ On its November 15, 1979 Distilled Spirits Price Posting Schedule, Berberian Bros., Inc. ("Berberian") lists its price to retailers for a case of one-quart bottles of Johnnie Walker Red Label Scotch Whiskey ("Johnnie Walker Red") as $112.72. Berberian's price to retailers for a case of one-quart bottles of Johnnie Walker Black Label Scotch Whiskey, 12 year ("Johnnie Walker Black") was $152.88. Exhibit C to Petitioners Replication and Memorandum in Support Thereof, dated February 5, 1980. Respondent Norman Williams Co.'s Price Posting Schedule of the same date, shows its price to retailers for a case of one-quart bottles of Johnnie Walker Red was $96.93, which is $15.79 less than Berberian's price at the time. Norman Williams Co.'s price to retailers for a case of one-quart bottles of Johnnie Walker Black was $133.25, which is $19.63 less than Berberian's price at that time. Exhibit G to Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari, dated November 15, 1979.

consumers from the activities of Respondents as high as $2.50 per bottle[3]/ However, even assuming the savings is only $0.25 per bottle, price competition could save California consumers $62,808,378 each year.[4]/ These savings are what the California courts, legislature and consumers had in mind when fair trade was eliminated. The designation statute is an attempt to revive fair trade, with its security for franchised wholesalers, lack of competition, and high prices for the liquor industry. The court below rejected this attempt to bring fair trade in through the back door as incon-

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3/ "Jack Daniels, meet Adam Smith," FORBES, November 23, 1981, p. 164.

4/ Savings computed using a figure of 12 bottles per case, which is how quarts, liters, fifths and 750 ml. bottles are packaged.

sistent with and preempted by the Sherman Act. This Court should affirm the decision below.

I.

THE DESIGNATION STATUTE IS ANTI-COMPETITIVE IN EFFECT AND IS PREEMPTED BY THE SHERMAN ACT

A. The Designation Statute Attempts To Authorize Practices Which Violate The Sherman Act

Consumers Union does not question California's power to regulate liquor importers; California has a licensing procedure which fills this function and all of Respondents are licensed. (Joint Appendix ("J.A.") 15). The designation statute goes beyond licensing, however, by allowing the distillers to make the final decision on who will be allowed to import distilled spirits into California and who will not. This allows the brand owners to eliminate competition at the wholesale

level in violation of section 1 of the Sherman Act. As the court below found, the designation statute "gives private parties the unfettered power to forbid interstate trade between other privates(sic) parties. Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act." Norman Williams, 108 Cal. App.3d at 358, 166 Cal. Rptr. at 570.

The Sherman Act prohibits anti-competitive practices by private parties such as group boycotts or price fixing. Fashion Originators Guild of America, Inc. v. F.T.C., 321 U.S. 457 (1941), United States v. Parke, Davis and Co., 362 U.S. 29 (1960). The Sherman Act seeks to eliminate these kinds of abuses in free markets by making such practices violations of federal law. In some instances states

have sought to authorize private parties to engage in such practices, but this Court has struck down those attempts as inconsistent with the Sherman Act. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). In this case there is an even clearer affront to Sherman Act principles because the designation statute does not simply authorize violations of the Sherman Act by brand owners. The designation statute actually creates the singular circumstances under which the violation can take place. Without the designation statute, a brand owner might lawfully prevent wholesalers with whom he does business from selling to other wholesalers, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), but he could never prevent a wholesaler from purchasing the brand

owner's distilled spirits.5/ The designation statute explicitly prohibits undesignated importers--although fully licensed by the state--from purchasing distilled spirits and importing them into California. This is a restraint on competition which no brand owner could accomplish through vertical restraints. In fact, short of physical restraint or intimidation, it is difficult to conceive of a way in which the distillers could prevent Respondents from importing distilled spirits which they have lawfully purchased. That the designation statute gives the distillers this power only underscores the tremendous privilege conferred

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5/ In Oklahoma, the brand owner cannot even restrict the wholesalers he sells to. The brand owner must sell to all wholesalers who wish to buy his brand, Okla. Stat. Tit. 37, § 533 and the wholesalers are free to sell to all "qualified persons." Okla. Stat. Tit. 37, § 521(e).

upon the distillers by the designation statute.

B. The Violation Of The Sherman Act Which The Designation Statute Authorizes Is A Per Se Violation

The court below noted that the violation of the Sherman Act which the designation statute authorizes is difficult to analyze in terms of the usual "per se" and "rule of reason" categories, but concluded that "A more clear power to restrain interstate trade is difficult to imagine." Norman Williams, 108 Cal.App.3d at 356, 166 Cal.Rptr. at 569. Per se violations of the Sherman Act are those occasioned by "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate

inquiry as to the precise harm they have caused or the business excuse for their use." Sylvania, 433 U.S. at 50, quoting Northern Pac. R. Co. v. United States, 366 U.S. 1, 5 (1958). In deciding whether a particular practice is a per se violation of the Sherman Act, "The probability that anti-competitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences." Sylvania, 433 U.S. at 50, fn.16.

1. The Anti-Competitive Consequences of the Designation Statute Are Certain and Severe

Here, the anti-competitive consequences are not merely probable, they are certain. Respondents have been denied designation by the brand owners, Norman Williams, 108 Cal.App.3d at 354, 166 Cal.Rptr. at 568, and

will therefore be excluded from the import market. The severity of the anti-competitive consequences is clear. 90% of the distilled spirits consumed in California are imported (J.A. 14), so the designation statute would eliminate the only meaningful competition at the wholesale level for virtually all distilled spirits.

2. The Designation Statute Has No Pro-Competitive Consequences

Before determining that the designation statute occasions a per se violation of the Sherman Act, the anti-competitive consequences must be balanced against the pro-competitive consequences. Sylvania, 433 U.S. at 50, fn.16. That is an easy task, because the designation statute will have no pro-competitive consequences. Although various petitioners and amici

have argued that the designation statute would allow franchised wholesalers to better serve their retailers, these arguments reflect nothing more than a desire to recover and retain the privileged position they held under fair trade laws, free from the pressures of competition. Wine and Spirits Wholesalers of America, Inc. and National Beer Wholesalers Association of America, Inc., ("WSWA and NBWA") in their amici curiae brief argue that the designation statute will protect authorized wholesalers from harm by other wholesalers who sell only to high volume retailers, thus "cream skinning" the most profitable accounts off the market. Brief of Amici Curiae WSWA and NBWA at 7-8.

But this type of activity can take place in any industry and is an accepted

part of competitive life. Petitioners are seeking to use the designation statute to shield them from the realities of competition. If it were true that the designation statute "merely recognizes" the distillers' "inherent power to designate importers to whom they will sell," as petitioners claim, Norman Williams, 108 Cal.App.3d at 357, 166 Cal.Rptr at 569, it would serve no purpose. What the designation statute actually does is grant the distillers a power they cannot exercise under the Sherman Act.

3. The Designation Statute Has the Effect of a Group Boycott

By giving the distillers the power to prevent Respondents from purchasing distilled spirits, California is sanctioning and enforcing an action which has the same effect as if all the distillers had

agreed with all of their franchised wholesalers not to sell to Respondents. This group boycott would deny Respondents access to 90% of the California distilled spirits market and would be a per se violation of the Sherman Act. Fashion Originators Guild of America, Inc. v. F.T.C., 312 U.S. 457 (1941). The distillers could avoid this result only by designating all licensed wholesalers. The designation statute obviously does not contemplate this possibility, since the statute would have no meaning if all licensed wholesalers were designated by the distillers.

The designation statute therefore authorizes a per se violation of the Sherman Act, as described by this court in Sylvania, Northern Pac. R. Co. v. United States, and Fashion Originators Guild.

C. Distillers And Franchised Wholesalers Are Adequately Protected By Other California Statutory Provisions

Even without the designation statute, Petitioners will be insulated from certain forms of competition. For example, "loss leaders" and premiums or gifts are already prohibited under California law.6/ If Respondents were to compete unfairly, Petitioners could seek redress under existing state law. Unfair Practices Act,

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6/ Business and Professions Code § 17044 prohibits using a "loss leader," defined in Business and Professions Code § 17030 as "any article or product sold at less than cost" where the intent is to encourage sales of other merchandise, mislead purchasers or injure competitors. "Cost" is defined in Business and Professions Code § 17026 as "invoice or replacement cost, whichever is lower ... plus the cost of doing business ... and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost." Gifts and sales under cost, with the intent of injuring competitors or destroying competition are prohibited by Business and Professions Code § 17043.

Business and Professions Code §§ 17000 et seq. Petitioners have shown nothing so unique, fragile, or even necessary about the liquor industry that requires it to be further insulated from competition by prohibiting would-be competitors from entering the market. Unlike the effect of Oklahoma's "open wholesaling" statute,7/ the lack of a designation statute will not force the brand owners to sell to wholesalers with whom they do not want to do business. Invalidating the statute will simply allow Respondents to continue to buy distilled spirits out of state, and sell them in California at prices below those charged by the authorized wholesalers, who adhere to the brand owners' "suggested" prices. J.A. 14 .

7/ Okla. Stat. Tit. 37, § 533.

D. The Sherman Act Should Be Used To Preserve The Competition Which Respondents Have Brought To The Market

It is remarkable that Petitioner Bohemian Distributing Company should attack the decision below on the ground that "federal antitrust law protects the process of competition, not the welfare of particular competitors," (Brief of Petitioner Bohemian Distributing Company, at 10) for protection of franchised wholesalers such as Bohemian is precisely what the designation statute seeks to accomplish. The designation statute was enacted to prevent competition by cutting off Respondents' source of supply for name brand liquor, thus forcing them out of business. If this Court reverses the decision below, it is the welfare of the large franchised wholesalers that will be protected, not the "process of competition."

Contrary to Petitioner Bohemian's contention, the federal antitrust laws seek to preserve the competition which Respondents have brought into the wholesale market, not to protect franchised wholesalers in their insulated positions.

II.

THE DESIGNATION STATUTE DOES NOT FURTHER ANY STATE INTEREST OF CALIFORNIA

A. The California Court's Findings Should Be Accorded Great Weight

The court below found no state interest is served by the designation statute. Norman Williams, 108 Cal.App.3d at 361, 166 Cal.Rptr. at 572. When the same court found no state interest was furthered by the price fixing statute in Midcal, this Court gave "great weight" to its views. Midcal, 445 U.S. at 111. The same result should obtain in this case.

It is interesting to note in this regard that Petitioner Rice, Director of the California Department of Alcoholic Beverage Control, does not appear from the legislative history to have even supported the legislation amending the designation statute. J.A. 56-73. Rice's comments in a recent magazine interview throw further doubt on the possibility that California believes the designation statute furthers any state interest. "Jack Daniels, Meet Adam Smith," FORBES, November 23, 1981.8/

8/ "What's shaping up in the liquor business today is a classic case of survival of the fittest--similar to developments in the airline, trucking and savings and loan industries. "Those that can adapt, will, those that can't, perish' says Rice ... 'that's the way the free enterprise system is supposed to work.'" "Jack Daniels Meet Adam Smith," FORBES, Nov. 23, 1981, p. 163.

B. The Designation Statute Will Not Aid California In Taxing Or Tracing Distilled Spirits

Petitioner WSWC claims the designation statute will aid California in taxing and tracing distilled spirits. The court below was corrected in rejecting this claim, Norman Williams, 108 Cal.App.3d at 361, 166 Cal.Rptr. at 572. There is nothing in the designation statute's legislative history to suggest that the California Legislature even considered administrative interests. J.A. 57-73. The only substantive justification Petitioners have averred for their administrative claim is that without the designation statute, the number of competitiors will increase and overseeing liquor will become "administratively more burdensome" for California. Brief of Amici Curiae, WSWA and NBWA at 31.

Absent some showing that California would "lose control" over distilled spirits wholesaling due to the increased administrative burden, administrative ease cannot be a legitimate state interest. In fact, California has been operating with an increased number of competitors for over 3 years, and there is no evidence that California's control over and review of liquor importation and taxation has been threatened in any way. Petitioners have not cited, nor do we know of, any enforcement actions made necessary by the increased number of competitors. Under Business and Professions Code § 23366.3, the Oklahoma wholesalers cannot ship distilled spirits into California until they agree to make their records available to California officials. The designation statute will not help California

officials in attempting to trace or tax distilled spirits shipments.

C. The Designation Statute Will Not Aid In Temperance

Petitioners have also advanced temperance as a justification for the designation statute, Norman Williams, 108 Cal.App.3d at 360, 166 Cal.Rptr. at 572. But they have completely failed to explain how the designation statute would further this goal. All the designation statute does is eliminate competition at the wholesale level. This will raise prices, but as the California Supreme Court found in Rice, higher liquor prices do not decrease consumption, Rice, 21 Cal.3d at 457, 146 Cal.Rptr. at 603. In Midcal, this court agreed. Midcal, 445 U.S. at 112-13.

D. The Designation Statute Will Not Protect Small Retailers

A final state interest which has been asserted is that of protecting small retailers. As noted above, the only certain effect of the designation statute is that it will raise prices by eliminating competition at the wholesale level. But as the California Supreme Court found in Rice, higher liquor prices do not protect small retailers. Rice, 21 Cal.3d at 456-7, 146 Cal.Rptr. at 602. See also Midcal, 445 U.S. at 113.9/ Small retailers are not hurt by the competition at the wholesale level, as can be seen from the fact that Respondent

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9/ Studies cited in Rice showed that retailers failed in fair trade states more frequently than in states without "fair trade" laws, even though the states without "fair trade" laws had lower prices. Rice, 21 Cal.3d. at 456, fn.21, 146 Cal.Rptr. at 602, fn.21.

wholesalers sell to small retailers (J.A. 15), and some of the Respondents in this case are small retailers who favor retaining the current competitive wholesale market in California. (J.A. 15).

III.

THE DESIGNATION STATUTE DOES NOT COME WITHIN THE STATE ACTION DOCTRINE

As this Court recognized in Midcal, the "state action" doctrine is designed to preserve our federal system by not allowing the Sherman Act to override state regulatory programs. Midcal, 445 U.S. at 103-4. In order for the "state action" exemption to apply, however, the anti-competitive practice at issue must be "clearly articulated and affirmatively expressed as state policy" and "'actively supervised' by the State itself." Midcal, 445 U.S. at 105

A. The Designation Statute Is Not Clearly Expressed As State Policy

In this case neither requirement of Midcal is fulfilled. The designation statute does not embody any clear state policy, because no state interest is furthered by the designation statute.10/ In fact, as the court below noted, the designation statute is directly opposed to the policy of competition expressed in the rest of California's laws governing distilled spirits. Norman Williams, 108 Cal.App.3d at 360 fn.3, 166 Cal.Rptr. at 572 fn.3.

10/ Supra at 24-30.

1. California's Distribution System Seeks to Encourage Competition; the Designation Statute Seeks to Prevent Competition

California's distribution system for distilled spirits has been characterized by Petitioners as "three-tiered." That is, there are distillers, wholesalers and retailers, with each level operated independently of the others. This description is not completely accurate, however. California also has rectifiers, businesses which purchase distilled spirits outside of California, bring the alcohol into California, add water to bring the liquid to the desired proof and then sell the final product to California wholesalers.11/ These products are some of the so-called "house

11/ Distilled spirits rectifiers are licensed under Business and Professions Code § 23368.1. A distilled spirits rectifier may also hold a distilled spirits wholesaler's license. Business and Professions Code § 23368.1 (West's Supp., 1981).

brands" which account for 10% of the distilled spirits consumed in California. (J.A. 17).

The point of California's three-tier system is not, as Petitioners would have this Court believe, that it is somehow magically related to the state's interest in liquor control. Rather, the three-tier system is a way to preserve competition by ensuring that the chain of distribution for distilled spirits does not become integrated and controlled by the brand owners. The pro-competitive policy behind preventing integration is evident. This is the opposite of the policy behind the designation statute, which seeks to eliminate competition at the wholesale level. Currently, twelve franchised wholesalers handle approximately 70% of the wholesale volume in imported distilled

spirits in California. J.A. 14. If this Court affirms the decision below, Respondents and others like them will be able to remain vigorous competitors with the franchised wholesalers, thus making the wholesale market competitive.

2. The Designation Statute Does Not Protect California's Distribution System Because That System Is Not Threatened by Respondents' Activities

Even if the three-tier system is considered an end in itself, the designation statute does not clearly express state policy because the three-tier sytem is not threatened by the "Oklahoma connection." All out of state shippers of distilled spirits (including the Oklahoma wholesalers who ship to Respondents) must obtain an "out-of-state distilled spirits shipper's certificate" from the Department of Alcoholic Beverage Control before the

distilled spirits can be shipped into California. Business & Professions Code § 23366.2 (West's Supp., 1981). In order to receive the certificate, the shipper must agree to comply with all California laws and regulations regarding distilled spirits and to make its books and records available to California officials for inspection. Business & Professions Code § 23366.3(a)(1) & (2). The shipper's certificate can also be revoked or suspended in the same manner as liquor licenses. Business and Professions Code § 23366.3(b). Thus, California law has already effectively absorbed the Oklahoma wholesalers into the three-tier system.

B. California Does Not Take An Active Role Under The Designation Statute

Not only is the designation statute not expressed as state policy, California also takes no part in making the decisions mandated by the statute. The brand owners make the only decisions under the designation statute, with no guidance or review by the state. In fact, what this Court said about the price setting program in Midcal is perfectly applicable here:

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. Midcal, 445 U.S. at 105-6.

Here the state neither decides which wholesalers are to be authorized, nor reviews the reasonableness of the brand owner's decisions; nor does it regulate

the terms of the designation contracts. The state does not monitor market conditions or engage in any "pointed reexamination" of the program. The designation statute therefore does not provide for any "active supervision" by the state, as required by this Court in Midcal.[12/] Active supervision by the state is necessary before the program can be found immune from federal antitrust laws.

12/ Even the instructions put out by the California Department of Alcoholic Beverage Control for use by out of state distilled spirits shippers do not indicate that California will take an active part in supervising the designation of authorized wholesalers. WSWC Petition for Certiorari, Appendix F, at 26.

IV.

THE TWENTY-FIRST AMENDMENT DOES NOT CONFER UNLIMITED POWER UPON THE STATES TO ENACT LEGISLATION WHICH CONFLICTS WITH THE SHERMAN ACT

A. The Twenty-First Amendment Did Not "Repeal" The Commerce Clause; The Two Must Be Balanced

Section 2 of the Twenty-First Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

As this Court recognized in Midcal, these broad state powers can conflict with Congress' power to regulate interstate commerce. How the conflict is resolved turns upon the circumstances of each particular case. Midcal, 445 U.S. at 110.

Petitioners would have this Court resolve the conflict by simply having the Twenty-First Amendment overrule the Commerce

Commerce Clause in the area of liquor regulation. This Court has refused to take such a simplistic course in the past. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), this Court reviewed prior decisions allowing the states great leeway in liquor regulation and stated:

> To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. Idlewild, 377 U.S. at 331-2.

Instead, this Court concluded the Twenty-First Amendment and the Commerce Clause "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Idlewild, 377 U.S. at 332. In Idlewild, the only state interest

the Court could find was in preventing diversion of alcohol from Idlewild's duty free international business to domestic commerce. Idlewild, 377 U.S. at 333. But New York was admittedly not seeking to do this so the Court held New York's law prohibiting Idlewild's type of business invalid under the Commerce Clause. Idlewild, 377 U.S. at 334.

B. The State's Interest Must Be Weighed As A Matter Of Federal Law

Although more complex than the analysis urged by Petitioners, finding and weighing the state's interests allows the court to strike the correct balance between the Twenty-First Amendment and the Commerce Clause for each case. In Midcal, this court explicitly recognized that the balance struck can differ

depending on the state interests involved. The court stated:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. Midcal, 445 U.S. at 110.

This passage establishes a clear dichotomy, one which the court below followed explicitly. Norman Williams, 108 Cal.App.3d at 359, 166 Cal.Rptr. at 571. A state has a clear and important interest in deciding whether to permit the importation or sale of liquor. The state has a similarly clear interest in deciding how to structure the liquor distribution system. In these areas, then, the states have a great amount of control, free from the Commerce

Clause. It is the states' interests that give them this freedom, however, not the fact that a statute can be characterized as concerning "importation" or "distribution." A state does not have the same freedom when enacting statutes which involve less important state interests.

The Twenty-First Amendment is essentially a grant of power to the states of an authority they had given up under the Commerce Clause. In balancing the two provisions, we should not "lose sight of the explicit grant of authority." Midcal, 445 U.S. at 107. The need to balance the Twenty-First Amendment and the Commerce Clause is well understood by the California courts. In Rice, the California Supreme Court recognized:

> When a statute enacted pursuant to the Twenty-First Amendment conflicts with an enactment based on the commerce clause,

> we must balance the policies furthered by each in order to determine which should prevail. Rice, 21 Cal.3d. at 443, 146 Cal. Rptr. at 596.

The California Appellate Court which considered Midcal followed Rice exactly on this point. That court is the same California Appellate court which invalidated the designation statute in this case. When this Court reviewed Midcal, it approved the balancing done in that case and, by implication, Rice. Midcal, 445 U.S. at 111-13. The same balancing was done by the court below in this case and should be affirmed.

C. State And Federal Interests Must Be Balanced As A Matter Of State Law

Balancing the state and federal interests is mandated not only by this Court's decision in Midcal, but also by the California Constitution. Article XX,

§ 22 of the California Constitution grants the State of California "subject to the laws of the United States regulating commerce between foreign nations and among the states....the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor." Cal. Const. Art. XX, § 22 (West's Supp. 1981). The California Constitution explicitly recognizes the supremacy of federal regulation even in areas covered by the Twenty-First Amendment. Therefore, as a matter of state law, the state and federal interests must be balanced, as the court below did.

As the court below found, no legitimate state interest is furthered by the designation statute. This conclusion was arrived at by the same California

Appellate Court whose decision was approved in Midcal and is entitled to great weight. Midcal, 445 U.S. at 111-12. The designation statute has the same effect as a group boycott, a per se violation of the Sherman Act. Indeed, the anti-competitive effects of the designation statute are even greater than those of a group boycott. Under these circumstances, as in Midcal, the federal interests clearly predominate, and the designation statute is therefore preempted by the Sherman Act.

V.

THE DESIGNATION STATUTE IS INVALID ON STATE GROUNDS

In the court below, Respondents raised a number of state grounds on which the designation statute could be found invalid. The court below found the designation statute invalid because it

conflicts with and is preempted by the Sherman Act and declined to consider Respondents' contentions based on state grounds. Norman Williams, 108 Cal.App.3d at 362, 166 Cal.Rptr. at 573.

One of these state grounds is that the designation statute is an unlawful delegation of state power. Article XX, Section 22 of the California Constitution provides the State of California has the "exclusive right" to regulate intoxicating liquor, subject only to the laws of the United States. California Constitution, Art. XX, Sec. 22 (West's Supp., 1981). The designation statute delegates to the distillers the final authority over who shall be allowed to import distilled spirits, in violation of Art. XX, Sec. 22 of the California Constitution.

Other state grounds which respondents raised, but which were not dealt with by the court below include violations of the California Constitution's guarantees of due process and equal protection (California Constitution, Art. I, Sec. 7). If this Court should conclude that the designation statute is not preempted by federal legislation, the proper course would be to remand the case for consideration of the state grounds.

CONCLUSION

The court below found the designation statute invalid because it conflicts with and is preempted by the Sherman Act. That decision is correct and should be affirmed by this Court.

Dated: February 16, 1982.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

BOHEMIAN DISTRIBUTING COMPANY,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,
Petitioner,

vs.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

BRIEF AMICI CURIAE ON BEHALF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

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Nos. 80-1012, 80-1030, 80-1052

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BRIEF AMICI CURIAE ON BEHALF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

This brief is filed with the written consent of all the parties, pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States. It is in support of the position of petitioners upholding the validity of the California law which provides that a brand of distilled spirits may be imported into California only by persons designated to do so by the brand owner.

INTEREST OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC.

The Distilled Spirits Council of the United States, Inc. (hereinafter "DISCUS") is a nonprofit corporation formed by distilled spirits manufacturers, importers, and others for the purpose of furthering the interests of the distilled spirits industry. Its members include the suppliers of a great majority of the distilled spirits sold throughout the United States.

The law held invalid by the court below was designed to protect the right of brand owner members of DISCUS to choose the wholesalers who distribute their brands in California. That right is presently being threatened by certain provisions of Oklahoma law which, as interpreted by a trial court of that state,[1] permit Oklahoma wholesalers to demand unlimited quantities of any brand of liquor sold in Oklahoma for transshipment to other states,

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[1]See *Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Board* (1981) No. CJ-81-1413 (Dist.Ct.Okla.Cty.). A copy of the trial court's opinion from the bench in *Central Liquor* has been lodged with the clerk of this Court in connection with the Brief of the Solicitor General in support of the Petition for Certiorari.

including California. Unless the legislation which is the subject of the present case is upheld, the interests of DISCUS members in California will be vitiated by that Oklahoma law or by similar laws which may be adopted by other states.

SUMMARY OF ARGUMENT

This case involves the claimed inconsistency between the Sherman Act and California Business and Professions Code § 23672. The California Court of Appeal, mistakenly believing that these laws were in conflict, held that the Sherman Act preempted the California law. But § 23672 does not require any conduct which is contrary to the Sherman Act, and consequently no issue of federal preemption is presented in this case. The decision of the court below to the contrary is plainly wrong and should be reversed.

ARGUMENT

I. THE FEDERAL ANTITRUST LAWS PREEMPT ONLY INCONSISTENT STATE LAWS.

Each state has authority under the Twenty-first Amendment to regulate the distribution of alcoholic beverages within its borders. "As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories' " (*Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, 42, quoting *U. S.* v. *Frankfort Distilleries* (1945) 324 U.S. 293, 299). Despite the strong presumption of validity accorded state legislation in this field, the court below erroneously held that federal antitrust laws preempt § 23672 of the California Business and Professions Code, which provides

that a brand of distilled spirits may be imported into California only by persons authorized by the brand owner.[3]

State police power, even over subject matters not specifically given to state control by the Constitution, is not to be lightly disregarded.

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained" (*Florida Avocado Growers* v. *Paul* (1963) 373 U.S. 132, 142).

Clearly, neither of these grounds for preemption is present here. Congress has not "unmistakenly * * * ordained" that the Sherman Act should preempt state control of alcoholic beverage distribution, nor is the subject matter one which demands uniform federal regulation. To the contrary, the Constitution plainly establishes individual state and local control over alcoholic beverages, not uniform national regulation. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" (*California Liquor Dealers* v. *Midcal Aluminum* (1980) 445 U.S. 97, 110).

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[3]"A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

Federal preemption may also occur when state and federal laws make incompatible demands. "A holding of federal exclusion of state law is inescapable * * * where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce" (*Florida Avocado Growers* v. *Paul* (1963) 373 U.S. 132, 142). This Court has held that preemption on this ground is appropriate only when the state and federal laws are in actual and inescapable conflict. The "teaching of this Court's decisions * * * enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists" (*Huron Cement Co.* v. *Detroit* (1960) 362 U.S. 440, 446).

So, for example, in *Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, this Court upheld New York's price affirmation statute against charges that collecting the information required by the statute would lead to horizontal price-fixing conspiracies. No grounds for federal preemption were found because the state law in that case "impose[d] no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the [law's] requirements" (384 U.S. at 45). By contrast, preemption was applied in *California Liquor Dealers* v. *Midcal Aluminum* (1980) 445 U.S. 97, because the challenged law affirmatively required distillers to fix the retail price of their products, in direct contravention of federal antitrust law.

II. THE CALIFORNIA STATUTE IS CONSISTENT WITH FEDERAL ANTITRUST LAWS.

A. The California statute permits a manufacturer to select distributors of its own products in California.

Section 23672 does not mandate resale price maintenance or any other violation of federal law. Unlike the fair trade laws held invalid in *California Liquor Dealers* v. *Midcal Aluminum* (1980) 445 U.S. 97, section 23672 serves only to preserve a competitive situation in California which is recognized and approved by antitrust policy. That policy is to protect the long-established right of a manufacturer to select, unilaterally and for legitimate business reasons, distributors for the manufacturer's own products.

Section 23672 enables a distiller directly to choose distributors of its products in California. This Court has repeatedly affirmed that under the antitrust laws a manufacturer is free "to exercise his own independent discretion as to parties with whom he will deal" (*United States* v. *Colgate & Co.* (1919) 250 U.S. 300, 307). "[T]he right to select its customers may well be the most essential factor in the maintenance of the highest standards of service" (*U. S.* v. *Bausch & Lomb Co.* (1944) 321 U.S. 707, 728-729). In *Reeves, Inc.* v. *Stake* (1980) 447 U.S. 429 this Court reaffirmed that right, holding that South Dakota, as the operator of a state-owned cement factory, could lawfully refuse to sell to non-South Dakota residents. When a manufacturer decides to distribute its products through one wholesaler and not another, the rejected distributor has suffered no antitrust injury, but only a defeat in the competitive market which the antitrust laws are intended to foster (see, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 489).

B. The California statute, by enabling manufacturers to establish franchises for sales of their own products in California, does not require conduct that is unlawful under the federal antitrust laws.

The court below acknowledged that § 23672 did not come within any of the "common violations of the Sherman Act" (Appendix to Petition for Certiorari,[3] p. 16), but it held nonetheless that the section on its face conflicted with the Sherman Act because it enabled a distiller "to prevent trade among others" (Appendix to Petition for Certiorari, p. 17). The court below regarded this power to prevent unauthorized third parties from purchasing a distiller's products as decisive. However, it failed to appreciate the significance to this case of this Court's ruling in *Continental T. V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36.

Section 23672 permits a brand owner to limit sales of its own products in California from distributors in other states. Distillers might ordinarily achieve the same result through vertical restrictions such as establishing a limited number of distributor franchises within California. However, the distiller's ability to establish such franchises in California has been undermined by the extraterritorial effect of laws of other states that deny the fundamental

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[3]References to the Appendix to Petition for Certiorari are to the Appendix to the Petition of Baxter Rice, No. 80-1012.

right of a seller to choose its customers.[4] The California Legislature enacted § 23672 to restore the normal competitive situation in California.

The control over sales from out of state provided by § 23672 can best be understood in light of this Court's ruling in *Continental T. V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, which held that vertical non-price restrictions imposed by private contract are not per se unlawful, but are to be judged under the rule of reason. The court below dismissed the *GTE Sylvania* case as inapposite on the ground that the present case involves "the state provided authority of the distillers to prohibit [respondents] from trading with others" (Appendix to Petition for Certiorari, p. 20), and stated that "it is irrelevant that the statute gives brand owners the power to restrain intrabrand competition rather than interbrand competition" (ibid., pp. 17-18). But the distinction between intrabrand and interbrand restrictions is critical. As explained in *GTE Sylvania*, limitation of intrabrand competition resulting from vertical non-price restraints may be justified by the resulting increase in interbrand competition. The reasoning

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[4]Oklahoma's Alcoholic Beverage Control law has been construed to require distillers to sell to every Oklahoma wholesaler all amounts of liquor ordered by such wholesaler, and to permit Oklahoma wholesalers to transship such liquor to other states, including California (*Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Board* (1981) No. CJ-81-1413 (Dist.Ct.Okla.Cty.). As so interpreted, this law has fundamentally altered the ordinary competitive situation in other states in which franchising is permitted. The California Legislature, by passing § 23672, has determined that the present franchise system of distribution should continue unaffected by the laws of Oklahoma or of any other state that subsequently may decide to adopt a similar non-franchise policy.

of *GTE Sylvania* applies equally whether the manufacturer's control over non-price, intrabrand competition is achieved through private contract or by some other means. It would be plainly inconsistent to hold that the Sherman Act permits vertical agreements under the rule of reason, but at the same time condemns as per se unlawful a statute whose sole purpose and effect is to make such agreements possible.

Even apart from the holding of *GTE Sylvania*, § 23672 does not require violation of the Sherman Act. The statute allows a distiller to designate any number of wholesalers as authorized importers of its products into California. A distiller may restrict importation to a single wholesaler, a few wholesalers, or it may designate all wholesalers in the state. The statute thus *permits*, but does not *require*, vertical restrictions on distribution.

The Sherman Act does not preempt state laws that only permit conduct that is judged under the rule of reason. In *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.* (1978) 439 U.S. 96, 110, n. 15, this Court upheld the California Automobile Franchise Act in the face of arguments that dealers might use it to press sham protests for the sole purpose of delaying establishment of competing dealerships. Such conduct, though made possible by the Automobile Franchise Act, would be vulnerable to suits under the federal antitrust laws and did not require invalidation of the state law (see also, *Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, 45-46; *Exxon Corp.* v. *Governor of Maryland* (1978) 437 U.S. 117, 130-131).

Finally, even if § 23672 did in some cases lead to anti-competitive results, federal preemption would still be inappropriate so long as the state law does not attempt to authorize a per se violation of the antitrust law. To hold § 23672 preempted by the Sherman Act would invite challenges to any state regulatory scheme that injures a plaintiff's competitive position and thus might be claimed to reduce competition generally. But, as this Court has stated, "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed" (*Exxon Corp.* v. *Governor of Maryland* (1978) 437 U.S. 117, 133).

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should reverse the decision of the court below.

Respectfully submitted,
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On Petitions for a Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

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~~MOTION OF HEUBLEIN, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF OF AMICUS CURIAE HEUBLEIN, INC. IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Did the California court of appeal err in ruling that the California designation statute, on its face, violates the Sherman Act, when the competitive restraint imposed by the statute is not the result of any contract, combination or conspiracy between private parties?

2. Did the California court of appeal err in ruling that the California designation statute violates the Sherman Act where:

   (a) The statute, by its terms, "clearly articulates and affirmatively expresses" a policy in favor of distribution through selectively designated wholesalers and against distribution through unauthorized wholesale channels; and

   (b) The policy in favor of distribution through selectively designated wholesalers and against distribution through unauthorized wholesale channels is directly imposed and enforced by, and hence, "actively supervised" by, the State itself?

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~~MOTION OF HEUBLEIN, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE~~

Pursuant to Rule 42.3 of this Court, Heublein, Inc. ("Heublein") respectfully moves for leave to file the accompanying brief as amicus curiae in support of the petitioners. Consent to the filing of this brief has been

obtained from counsel for each of the three petitioners and also from counsel for respondents.

Heublein is a producer and importer of distilled spirits and wines which are sold in California and throughout the United States. Heublein has a direct and important interest in the outcome of this appeal, both as a marketer of distilled spirits in California and other states, and as a defendant in related state court litigation in Oklahoma. Moreover, Heublein respectfully submits that its participation as an amicus curiae will provide this Court with a more complete analysis of the legal issues in this case.

Heublein distributes its products in California and other states through a system of selectively authorized wholesalers. Heublein's authorized wholesalers make substantial investments and undertake a variety of tasks essential to Heublein's success in competing against other producers and importers of alcoholic beverages.

The California court of appeal's decision invalidated the California designation statute which prevented unauthorized California wholesalers from purchasing or accepting delivery of distilled spirits. By invalidating that statute, the decision below has enabled California wholesalers to secure supplies of Heublein's products even though they are not authorized as Heublein distributors. In particular, unauthorized California wholesalers have secured supplies of Heublein's products from Oklahoma wholesalers, who have interpreted that State's laws as requiring that Heublein ship to them unlimited quantities of products even when they intend to ship those products to California and other states. Such shipments from Oklahoma wholesalers to other states are referred to in the trade, and in the court of appeal's decision, as the "Oklahoma Connection."

Sales of Heublein's products by unauthorized wholesalers in California have caused substantial harm to Heublein because unauthorized wholesalers do not make the investments or perform the functions which are critical to the success of Heublein's products. Furthermore, sales

by unauthorized wholesalers have caused Heublein's authorized distributors to lose sales, to lay off sales employees and to lose the incentive to perform those functions necessary for Heublein to compete effectively. Unless the court of appeal's decision is reversed, sales by unauthorized wholesalers in California will continue, with their resulting adverse affects on the marketing of Heublein's products. Hence, Heublein has a direct and important stake in the outcome of this appeal.

Furthermore, several parties contend that there are at least fifteen other states which have laws similar to the California designation statute.[1] To the extent that the laws of other states are similar to the California designation statute, the court of appeal's decision creates doubt as to the validity of those laws and, thus, may adversely affect Heublein's ability to implement its selective distribution system in those other states.

Heublein is also substantially interested in this case because it is a defendant in an appeal pending before the Oklahoma Supreme Court in which the issue is the legality of distilled spirits shipments from Oklahoma wholesalers to unauthorized wholesalers in California. This Oklahoma appeal, *Central Liquor Co., et al. v. Oklahoma Alcoholic Beverage Control Board, et al.*, No. CJ-81-1413 (Okla. Dist. Ct. Aug. 11, 1981), *appeals docketed*, Nos. 57284, 57394 (Okla. Sup. Ct. Aug. 13 and 14, 1981), involves the issue whether, under Oklahoma law, distilled spirits producers are compelled to honor purchase orders from Oklahoma wholesalers when the products ordered are to be shipped to other states. If the California court of appeal's decision is reversed and the California designation statute is upheld, unauthorized California wholesalers will be unable to acquire

[1] Petition for Writ of Certiorari by Baxter Rice, Director, Department of Alcoholic Beverage Control of the State of California at 28-29 n.7; Petition for Writ of Certiorari by Wine & Spirits Wholesalers of California at Appendix E.

Heublein's products from Oklahoma wholesalers. In that event, the appeal before this Court will resolve, in part, the controversy underlying the Oklahoma litigation and, thus, directly affect Heublein's interest in that litigation.

Finally, in the accompanying amicus brief, Heublein shows that the California designation statute does not violate the Sherman Act for at least two reasons. The first reason is that the restraint imposed by the designation statute is not the result of any contract, combination or conspiracy, the existence of which is essential to the finding of a Sherman Act violation. Heublein also shows that the designation statute not only "clearly articulates and affirmatively expresses" a policy in favor of distribution through selectively authorized wholesalers, but also satisfies the "active supervision" test of the state action doctrine because the restraint arising from the statute is imposed directly by the State itself and not by private parties. To date, neither of these arguments has been made by any party to this appeal. Hence, Heublein's participation as an amicus is calculated to provide this Court with a more complete analysis of the legal issues which are central to the Court's disposition of this appeal.

CONCLUSION

For the foregoing reasons, Heublein, Inc. respectfully moves for leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE HEUBLEIN, INC. IN SUPPORT OF THE PETITIONERS

Heublein, Inc. ("Heublein") respectfully submits this brief as amicus curiae in support of the petitioners in these three consolidated appeals and urges that the order of the Court of Appeal of the Third Appellate District of the State of California be reversed.

INTEREST OF AMICUS CURIAE

The interest of Heublein as amicus curiae is fully set forth in the Motion of Heublein, Inc. For Leave To File Brief Amicus Curiae, filed concurrently with this brief.

SUMMARY OF ARGUMENT

The California court of appeal held unlawful, on its face, that portion of Section 23672 of the California Business and Professions Code which provides that: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." Cal. Bus. & Prof. Code (West 1964 & Cum. Supp. 1981). The court of appeal found that the statute prevented unauthorized wholesalers from purchasing or accepting delivery of distilled spirits and concluded that such a competitive restraint constituted a *per se* violation of the Sherman Act. *Norman Williams Co. v. Rice*, 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980).

There are at least two reasons why the court of appeal's decision should be reversed. First, the Sherman Act requires a contract, combination or conspiracy between private parties. The designation statute neither compels nor authorizes any such contract, combination or conspiracy. Hence, the competitive restraint imposed by the designation statute does not violate the Sherman Act.

Second, the designation statute satisfies the requirements of the state action doctrine and, accordingly, is exempt from the Sherman Act. The designation statute, by its terms, "clearly articulates and affirmatively expresses" a policy in favor of distribution through selectively authorized wholesalers and against distribution through unauthorized wholesale channels. Moreover, because this policy of preventing unauthorized California wholesalers from purchasing or accepting delivery of distilled spirits is imposed directly by the State itself through enforcement of the designation statute, without the delegation of any discretion to private parties, the restraint resulting from this statute is "actively supervised" by the State.

ARGUMENT

I. THE CALIFORNIA DESIGNATION STATUTE DOES NOT VIOLATE THE SHERMAN ACT INASMUCH AS THE RESTRAINT IMPOSED BY THAT STATUTE IS NOT THE RESULT OF ANY CONTRACT, COMBINATION OR CONSPIRACY

The court of appeal invalidated the California designation statute on the ground that it constituted a *per se* violation of the Sherman Act. In the court's view, a *per se* violation was created because the statute prevented unauthorized California wholesalers from acquiring distilled spirits from wholesalers in other states. Although the designation statute does prevent unauthorized California wholesalers from purchasing or accepting delivery of distilled spirits, this result is not achieved through any contract, combination or conspiracy between private parties. In the absence of such a contract, combination or conspiracy, the designation statute does not violate the Sherman Act.

As is well established, Section 1 of the Sherman Act prohibits only those unreasonable restraints of interstate trade or commerce which result from a "contract, combination or conspiracy." 15 U.S.C. § 1; *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1072 (3d Cir. 1978); *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888, 890 (7th Cir. 1966). This fundamental prerequisite to a Sherman Act violation was not even addressed by the court of appeal. Rather, relying on 54 *Am. Jur.* 2d, Monopolies, Etc. § 1, p. 668, the court of appeal erroneously assumed that the Sherman Act proscribes all "devices or practices" which restrict competition. Determining that the designation statute would have such an effect, the court invalidated the statute. 108 Cal. App. 3d at 355; 166 Cal. Rptr. at 568.[1]

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[1] Assuming, *arguendo*, that the restraint imposed by the designation statute resulted from a contract, combination or conspiracy between private parties, it is clear that, as a non-price vertical re-

The court of appeal should have upheld the designation statute under the Sherman Act because the California statute neither compels nor authorizes any agreement among private parties. The designation statute does not compel or permit an agreement between the brand owner and an authorized wholesaler which restricts an unauthorized wholesaler from acquiring the owner's brands. Rather, the statute itself prohibits unauthorized California wholesalers from obtaining distilled spirits from wholesalers in other states. The restraint, therefore, arises from the statute and is not the result of any contract, combination or conspiracy.

In addition to prohibiting distribution to unauthorized wholesalers, the designation statute does recognize and preserve the long-standing right of a brand owner unilaterally to select and limit the wholesalers with whom it will deal. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71, 76, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). The exercise of this right through the selective designation of particular wholesalers as authorized distributors is a unilateral act which, under the Sherman Act, does not create any contract, combination or conspiracy and is lawful even though it may limit the number of wholesalers carrying a given brand and, in that sense, may have a restrictive competitive effect.

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straint, the competitive effect of such an agreement must be judged under the "rule of reason," which requires consideration of "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The fact that the court of appeal did not examine the competitive effects of the designation statute under the "rule of reason," but instead determined that the statute resulted in a *per se* violation of the Sherman Act, is an additional ground on which the decision below should be reversed. Brief for the United States as Amicus Curiae at 8, 15-27.

In this regard, the California designation statute is similar to a Connecticut distilled spirits minimum markup statute unanimously upheld by the United States Court of Appeals for the Second Circuit in *Morgan v. Division of Liquor Control*, 1981-2 Trade Cas. ¶ 64,366 (2d Cir. 1981). Under that statute, producers unilaterally established their own prices to wholesalers. The prices charged by wholesalers to retailers were required to reflect a prescribed minimum markup over and above the price charged by producers. A separate minimum markup was statutorily imposed on prices charged by retailers to consumers. Rejecting the claim that a Sherman Act agreement was created by this statute, the appeals court held that no contract, combination or conspiracy was formed because the producer unilaterally established its price to wholesalers and the minimum wholesale and retail markups were prescribed by statute. *Id.* at 74,688.

The California designation statute is very different from the statute invalidated by this Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* (*"Midcal"*), 445 U.S. 97 (1980). The statute held contrary to the Sherman Act in that case compelled a wine producer to dictate to wholesalers the prices to be charged to retailers for the producers' brands, and thereby mandated the formation of resale price maintenance agreements between private parties. In contrast, the restraint under the designation statute preventing unauthorized wholesalers from purchasing distilled spirits is not the result of any agreement between private parties, but simply the result of the designation statute itself.

Furthermore, the State itself, when acting in a legislative and regulatory capacity, cannot be regarded as having entered into a Sherman Act contract, combination or conspiracy with owners of distilled spirits brands or any other party. This point was clearly established in *Parker v. Brown*, 317 U.S. 341 (1943). Although *Parker*

is best known for its holding that trade restraints mandated and supervised by State governments are immune from the Sherman Act as "state action," that decision also held that the State of California "made no contract or agreement and entered into no conspiracy in restraint of trade" in adopting and enforcing the California program for the pricing and production of raisins. *Id.* at 352.

This principle has been uniformly followed. The recent decision by the Second Circuit Court of Appeals in *Morgan v. Division of Liquor Control*, *supra*, held that no Sherman Act agreement resulted when the State of Connecticut by statute imposed minimum wholesale and retail markups on base prices established by a distilled spirits producer. To violate the Sherman Act, "the contract, combination or conspiracy must reflect an agreement between independent businessmen," *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1029 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979), or "concerted action by separate business entities," *Polytechnic Data Corp. v. Xerox Corp.*, 362 F. Supp. 1, 8 (N.D. Ill. 1973).

For all these reasons, the restraint imposed on unauthorized wholesalers resulting from the designation statute is not the product of any contract, combination or conspiracy in violation of the Sherman Act and, on this ground alone, the court of appeal's decision should be reversed.

II. THE CALIFORNIA DESIGNATION STATUTE SATISFIES THE REQUIREMENTS OF THE STATE ACTION DOCTRINE

As noted above, the designation statute prevents unauthorized California wholesalers from purchasing or accepting delivery of distilled spirits. This restraint satisfies

the "state action" test set out in *Midcal* in that it is "clearly articulated and affirmatively expressed as state policy" and it arises from a policy which is "actively supervised" by the State itself. 445 U.S. at 105.[2]

A. By Its Terms, The California Designation Statute "Clearly Articulates and Affirmatively Expresses" A Policy In Favor Of Distribution Through Selectively Designated Wholesalers and Against Distribution Through Unauthorized Wholesale Channels

The prohibition against distribution of distilled spirits through unauthorized wholesale channels is "clearly articulated and affirmatively expressed as state policy," within the meaning of this Court's *Midcal* decision. Indeed, no party contends otherwise. The policy is plain on the face of the statute itself.

The statute provides that a "licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." Cal. Bus. & Prof. Code § 23672 (West 1964 & Cum. Supp. 1981). Thus, the terms of the statute clearly prohibit distribution through unauthorized wholesalers in favor of distribution through selectively designated wholesalers. Where, as here, the state policy is plainly dis-

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[2] The act of designating authorized wholesalers is a unilateral act which, as shown above, is lawful under the antitrust laws. (*See* page 5, *supra.*) Thus, the state action doctrine, and its "active supervision" requirement, are not necessary to uphold this element of the designation statute. Nevertheless, even as to this element of the statute there exists an administrative system for the active supervision of the designation process. Petition for Writ of Certiorari by Wine & Spirits Wholesalers of California at 21; Brief of Amicus Curiae United States Brewers Association in Support of Petition for Writ of Certiorari at 9.

cernible on the face of the statute at issue, there can be no doubt that the first prong of the *Midcal* test is met. *Bates v. State Bar of Arizona*, 433 U.S. 350, 362-63 (1977) (State Supreme Court rules banning lawyer advertising "reflect a clear articulation of the State's policy with regard to professional behavior"); *Morgan v. Division of Liquor Control*, *supra*, at 74,688-89 (minimum markups on alcoholic beverages were "explicitly prescribed in the statutes themselves").

B. The California Policy in Favor of Distribution Through Selectively Designated Wholesalers and Against Distribution Through Unauthorized Wholesale Channels Is Directly Imposed and Enforced By, and Hence, "Actively Supervised" By, the State Itself

Where the trade restraint at issue is imposed directly by the State itself, without private action, the restraint is exempt from the Sherman Act as "state action." Thus, in *Bates v. State Bar of Arizona*, *supra*, this Court upheld the State of Arizona's ban on lawyer advertising as "state action" where the alleged restraint was imposed and enforced by the State of Arizona itself. The advertising ban was legally operative without private action. No discretion with respect to advertising was delegated to private parties. The ban as promulgated was enforced by the State and, in such circumstances, this Court found "state action" and not private action.

Here, as in *Bates*, the State itself directly imposes the restraint complained of and leaves nothing to the discretion of private parties. The reason why unauthorized wholesalers cannot purchase or accept delivery of distilled spirits is because, by its terms, the designation statute prevents them from doing so. Historically, the policy of the designation statute has been vigorously en-

forced. Indeed, the State of California is here defending its right to enforce the designation statute.

The absence of private involvement in the formulation and imposition of the restraint distinguishes this case from *Midcal*. The statute in *Midcal* was appropriately ruled unlawful because the resale price maintenance restraint challenged in that case was established by private parties. This Court held in *Midcal* that in order for privately established restraints to constitute "state action," they must be "actively supervised" by the State. 445 U.S. at 105-06.

Because the restraint at issue here is not dependent upon private action for its formulation or imposition, there is no private action for the State to supervise. The restraint is directly imposed by the State itself, without any discretion given to private parties, and, therefore, the "active supervision" required by *Midcal* is satisfied by the enforcement of the statute.

This principle was recently recognized in *Morgan v. Division of Liquor Control*, *supra*, where retailer and consumer groups challenged a Connecticut distilled spirits minimum markup statute on the ground that the markups restrained price competition. The minimum markups were established and imposed by the challenged statute without any private party involvement. The appeals court found that this was "active supervision" for purposes of the state action doctrine.

Here, as in *Morgan*, the restraint imposed by the designation statute is directly imposed by the State itself and is not the result of any discretion having been delegated to private parties. Hence, that restraint is "actively supervised" by the State and the designation statute is exempt from the Sherman Act as state action.

CONCLUSION

For the foregoing reasons, Heublein, Inc. respectfully submits that the decision of the Court of Appeals of the Third Appellate District of the State of California should be reversed and that the portion of Section 23672 of the California Business and Professions Code at issue in this appeal should be declared valid.

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January 14, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 1982, three copies of the Motion of Heublein, Inc. for Leave to File Brief Amicus Curiae and Brief of Amicus Curiae Heublein, Inc. in Support of the Petitioners were mailed, first-class mail, postage prepaid, to the following:

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Nos. 80-1012, 80-1030, 80-1052

IN THE

Supreme Court of the United States

October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California, *et al.*,
Petitioners,

v.

NORMAN WILLIAMS COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate Division

BRIEF OF *AMICI CURIAE* WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND NATIONAL BEER WHOLESALERS ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AND NATIONAL BEER WHOLESALERS ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

Interest of *Amici Curiae*

With the written consent of all parties, Wine and Spirits Wholesalers of America, Inc. ("WSWA") and National Beer Wholesalers Association of America, Inc. ("NBWA"), pursuant to Rule 36 of this Court, submit this brief as *amici curiae* in support of the petitioners.

As the major national trade associations for wholesale distributors of distilled spirits, wines and malt beverages, WSWA represents more than 800 members in 41 states and NBWA represents more than 1,800 members in 50 states.[1] Most of them conduct their distribution businesses pursuant to wholesale licenses issued by the "open" or "license" states (*i.e.*, those which permit the distribution of alcoholic beverages by private enterprise concerns as distinguished from the minority of "monopoly" or "closed" states in which the state itself operates the business of wholesaling one or more types of alcoholic beverage). Because the need for governmental regulation of beverage alcohol has been universally accepted, in these open states each separate level of the trade is subject to highly detailed but purposefully integrated regulatory complexes. Reflecting the individual policies of the particular state, these regulatory structures differ significantly from state to state and beverage to beverage.

The decision below, reported as *Norman Williams Co .v. Rice,* 108 Cal. App.3d 348, 166 Cal. Rptr. 563 (1980),[2] is of the utmost concern and importance to the members of WSWA and NBWA, because it constitutes a radical departure from controlling precedent and threatens both effective competition and existing governmental regulation not merely in California but in many other states, too. If not repudiated, the erroneous and far-reaching rationale adopted by the court below in striking down California's "designated wholesaler" or "primary source" requirement threatens similar statutes of the many other states where the members of WSWA and NBWA do business.

Williams, if adopted in other jurisdictions as a viable precedent, would presage the destruction of the franchised

1. Both *amici* are not-for-profit corporations.

2. The opinion appears as Appendix A to the Petition for Certiorari filed with the Court by Wine & Spirits Wholesalers of California, an intervenor below (No. 80-1030). Citations to that opinion in this brief will be by reference to the page numbers of Appendix A (*e.g.*, "A5").

distributor system which prevails in the alcoholic beverage industries. State courts, acting purportedly in the name of federal antitrust principles but in fact contrary to and without the benefit of the rule-of-reason analysis mandated by this Court in its controlling decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), would destroy the benefits of heightened interbrand competition which flow from the existing pattern of designated wholesalers. As in other industries, this pattern of distribution exists because it achieves the most effective interbrand competition by holding designated wholesalers responsible for providing the local market services necessary to promote the maximum sales of each brand entrusted to them. As demonstrated by experience in Oklahoma, Minnesota and Kansas, elimination of franchised distributorships results in a substantial reduction in the number of brands available to consumers, the number of retailers serving them, and the number of wholesalers competing for their trade.

The rationale of *Williams* threatens fundamental changes in the structure, competitive tenor and governmental regulation of the alcoholic beverage industries in this country. The outcome of the case is of extraordinary import not only to the WSWA and NBWA members and other participants in those industries but to the states and their regulatory agencies, as well. *Amici* believe that in this brief they will present matters germane to this Court's decision which may not be treated or may not be developed fully by the petitioners because of their differing, although wholly compatible, positions and perspectives.

Statement

Solely upon grounds of asserted repugnancy to federal antitrust law and upon the face of the statute, the Court of Appeal of the State of California, Third Appellate District, enjoined enforcement of the designated wholesaler

or primary source requirement for the importation of distilled spirits enacted by the legislature of that state as §23672 of the California Business and Professional Code. Contrary to the erroneous conclusion of the court below that the California statute it struck down would result in *per se* violation of the Sherman Act, ironically this case in fact mirrors a classic example of the threat to effective interbrand competition posed by the "free rider" problem, analyzed by this Court in *GTE Sylvania.* 433 U.S. 36, 54-55. Provisions of the Oklahoma liquor laws peculiar to that state's regulatory structure have spawned a so-called "Oklahoma connection" which has disrupted and threatened the destruction in other states of free market relationships designed to foster competition and avoid "free riding."

Oklahoma requires that any brand sold to an Oklahoma distributor must be sold, without limitations on quantity, to all other Oklahoma wholesalers and at the lowest price at which it is sold anywhere else. The Oklahoma laws also provide that Oklahoma wholesalers may sell to "qualified persons" outside Oklahoma. Okla. Stats. Ann., Title 37, §§521(e), 533, 536.1. For more than a decade, Oklahoma wholesalers thus have been able to divert unlimited quantities of leading brands to non-franchised distributors in any state which failed to adopt a counteracting designated wholesaler or primary source law. The result was in effect the forced substitution of Oklahoma's prohibition of wholesaler franchising for the traditional freedom of suppliers to deal only with whom they choose, selectively designating wholesalers who undertake and are obligated to perform those functions essential to achieving the most vigorous competition among the myriad brands of alcoholic beverages vying for the consumers' favor.

Since 1972, §23672 or its predecessor has prohibited any California wholesaler from importing into California any brand of spirits unless designated as an authorized importer by the brand owner. These provisions were en-

acted by the legislature to facilitate administration of the state's overall regulatory scheme by stopping the purchase of liquor from Oklahoma wholesalers by parties licensed in California but not designated by the supplier or primary source of the brand.

The respondent wholesalers, the California licensees who challenged §23672, purchased from Oklahoma wholesalers only certain leading, fast-moving, nationally advertised brands in just the most popular container sizes. Enjoying a cost advantage from dealing with accounts taking large-volume deliveries and avoiding the higher expense incurred by the designated wholesalers because of their obligation to carry all sizes of all brands of a supplier and to serve all types of retailers, no matter how distant, small or costly to serve, the non-designated wholesalers profited from the "Oklahoma connection" by "cream-skimming" the lucrative, large account segment of the retail trade. Deprived of that business by prices they could not match, the designated wholesalers' average unit costs were increased both by the substantial reduction in their former volume of business and the higher costs of serving the remaining marginal or less profitable accounts.

A majority of the license states have primary source or designated wholesaler statutes which, like §23672 in California, require, expressly or with the same effect in practical terms, that alcoholic beverages, whether distilled spirits, wine, or others, come directly from the brand-owning supplier (*e.g.*, distiller, rectifier, vintner, brewer, prime importer or other supplier). These suppliers are required to hold licenses or permits and are subject to state regulation and control as a condition to the states' allowing the importation of or sale within their borders of the suppliers' brands.

The primary source statutes advance the legitimate legislative purposes not only of facilitating state control of

alcoholic beverages at all three tiers[3] of the trade but also of orderly, efficient and competitive marketing to provide ready availability of many competing brands in all sizes and at all types of retail outlets, small and large, in sufficiently numerous locations to insure convenient access to consumers and to encourage both price competition and the furnishing of a broad variety of pro-competitive, volume-building wholesaler services. The statutes achieve these objectives by permitting selective franchising by suppliers of designated wholesalers (whether one or several in a given marketing area), who are then obligated to invest their time, effort and money in serving all retail accounts and in furnishing the services necessary to promote sales of a particular supplier's brand in vigorous competition with those of other suppliers, enhancing brand recognition and consumer demand for and satisfaction with that brand.

Using distilled spirits as an example, in that industry, because of the importance of brand recognition in the minds of consumers, it is deemed essential that brands be available in every outlet where they can be placed. The widespread availability and visibility thus achieved both satisfy and augment demand by creating a consumer image of the popularity and quality of the product. In addition to this total account coverage, wholesalers are expected to promote sales volume by obtaining desirable shelf or display space at retail establishments everywhere, educating retailers as to the merits of the brands they represent and persuading them to recommend them to consumers, insuring that full stocks in all sizes are continually and readily available for prompt delivery to retailers wherever located and however

3. The regulatory structures controlling the importation of alcoholic beverages into the states mandate a "three tier" system comprised of separate entities at each of the supplier or producer, wholesaler and retailer levels. Suppliers can sell only to licensed wholesalers and not to retailers. The suppliers, therefore, must look to the wholesalers for the numerous services essential to maximizing the sales volume of their brands in competition with the many brands of competing suppliers.

small, and providing a variety of other services, all of which are designed to build the brand and increase consumer call for it. Even the few brands most heavily advertised by the suppliers cannot achieve their potential without such wholesaler promotional support, which is necessary at the local market level to win retailer and consumer acceptance of the brand and thrust for its advancement.

The primary source requirements allow a supplier to designate selectively and hold franchised wholesalers responsible for securing the broadest possible account coverage and furnishing the most effective promotional services to achieve maximum volume and enhance consumer awareness and demand for the brand. A designated wholesaler must be willing and able to serve the large number of small, distant and marginal accounts, including the lower-volume on-premise consumption outlets such as restaurants, clubs and bars, which are costly to serve[4]; he cannot "cherry-pick" and concentrate solely on the large retail stores, which offer greater profit potential but are unable, alone, to provide the total volume and brand-building consumer awareness which flow from marketwide availability and visibility when the brand is placed and featured in every possible outlet.

The unauthorized wholesaler, on the other hand, has no obligation or incentive to build or maintain any brand. He is interested only in handling those leading brands, whichever they may be at the moment, for which there is the greatest consumer demand—a demand built by the competitive efforts of others. Where unrestrained by a pri-

4. At the same time, the average unit costs of distributing a brand can be lowered when duplication of services, inventory and other expenses is avoided or minimized by the economies of scale which result from placing a brand with one or several but not all wholesalers. These economic factors support the selective distributional patterns which primary source statutes permit as the lowest cost, most efficient means not only to introduce new brands but to keep existing brands in fully effective, vigorous competition with those of other suppliers.

mary source or designated wholesaler statute, the unauthorized wholesaler who obtains such a leading brand elsewhere is free to offer it to just the larger, profitable retailers, neglecting the small, distant and high-cost outlets. The resulting pressure upon a wholesaler designated for that brand destroys his ability to maintain its position. His gross profits decline as the "cream-skimmer" or "free rider" wins sales from the larger accounts. His average unit costs rise as the higher-cost outlets become a greater percentage of his reduced volume, while the "free rider" realizes an increasing cost advantage from concentrating on the larger, profitable outlets. Total account coverage and brand availability, visibility and image suffer as the smaller, distant and high-cost outlets are served inadequately or not at all and as the designated wholesalers cease to provide promotional services they can no longer afford. Market penetration and sales volume for the brand must ultimately decline, and its position deteriorates in relation to that enjoyed in other comparable markets where total account coverage and the promotional services furnished by designated wholesalers are not destroyed by "free riding."

As this Court recognized in *GTE Sylvania*, selective designation of wholesalers and the imposition of vertical restrictions upon where and to whom they can resell (restrictions not required by the primary source law in California and most other states) can maximize sales for a supplier by achieving efficiencies and stimulating the furnishing of competitive services by wholesalers committed to building volume for his particular brand. Such distributional restrictions limit or prevent other "free riding" wholesalers—those who elect not to undertake and bear the cost of promotional, volume-building efforts but choose instead to concentrate upon the large-volume, most profitable accounts—from reaping the benefits of such interbrand competitive activities and destroying the capacity of others to provide such services. "Free riding", by reducing the

volume designated wholesalers sell and their gross profits, prevents them from providing such competitive services because the costs incurred cannot be recovered.

To the extent that the primary source statutes protect them from the "free rider" problem, the franchised wholesalers in the alcoholic beverage industries have been stimulated and enabled to undertake the commitment and cost of furnishing their panoply of volume-building services not only for leading brands but also for newly introduced, less successful or even struggling brands. If the *Williams* decision stands, however, these salutary interbrand competitive activities are doomed in California and seriously threatened in the other primary source states where the mistaken precepts of that decision may be adopted. The "Oklahoma connection" and the peculiarities of that or some other state's probibition upon selective wholesaler franchising will be substituted by erroneous judicial determination for the primary source and designated wholesaler laws, with resulting adverse effect upon the vigorously competitive environment those laws have fostered.

Even a cursory look at the competitive structure of the liquor business in Oklahoma evidences the stultifying effects upon interbrand competition which can be anticipated with the effective elimination of wholesaler designation which the *Williams* decision augurs and the resulting cessation of those volume-building services for which a franchised wholesaler is responsible to the supplier of a brand. Compared to the more than one hundred wholesalers in California, under Oklahoma's no-franchise requirement the number of wholesalers declined from more than twenty to half a dozen, two of whom accounted for 60 percent of all sales there. Posted wholesaler markups have been identical. Hundreds of brands sold in California have been unavailable to consumers in Oklahoma. New brands introduced in California and elsewhere are not distributed in Oklahoma. A few leading, nationally advertised brands command a dispro-

portionately high share of the Oklahoma markets in comparison with their showing in California and other franchise states.

Wholesaler promotional services to build the volume of any brand in competition with those of other suppliers are non-existent in Oklahoma. In essence, competition and consumer demand in that state are determined solely at the distiller level and substantially in terms of only the small number of brands which are nationally advertised. Even those brands fail to reach their maximum potential because of the lack of local wholesaler support. At the consumer level, the trade in the metropolitan areas has been dominated by a few large retailers (one of whom accounts for approximately 10 percent of total sales in the state). Their volume permits them to buy and sell at prices which hold down the number of retailers, because smaller stores cannot compete.

A markedly similar picture has emerged in Minnesota in the last few years since that state adopted a requirement that suppliers sell to all wholesalers, thereby prohibiting designated wholesaler franchises.[5] By contrast, to encourage more effective competition, Kansas has recently substituted an exclusive distributorship requirement for its former law that suppliers must sell to all wholesalers, and there has been a substantial increase in the number of brands available and competing with the leading brands there.

Summary of Argument

As the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division have advised the Court, the decision below, striking down on its face

5. While it requires sales to all wholesalers of any brand sold there, Minnesota, unlike Oklahoma, prohibits Minnesota wholesalers from selling elsewhere unless authorized by the brand owner or supplier. Minn. Stats. Ann., §§340.114 and 340.145.

as a *per se* violation of the Sherman Act California's statute requiring that wholesalers of distilled spirits there must be designated by the brand-owning supplier or primary source, is plainly incorrect. The state court's conclusion that the designation statute purportedly gives unfettered power to suppliers to restrain competition by forbidding unauthorized California wholesalers to buy from Oklahoma wholesalers provides no basis for finding the statute in conflict with the federal antitrust laws.

The designation statute deals only with supplier designation or franchising of wholesalers, simply permitting suppliers to exercise the same freedom enjoyed under the antitrust laws to elect those with whom they will deal in California and, if they choose, to establish a selective distribution system in which the designated wholesalers are responsible for fully promoting a brand in interbrand competition with the many brands of other suppliers. While the statute may enable or facilitate territorial or other vertical non-price restrictions, it does not require them or protect them from antitrust scrutiny. Any such restrictions, however, in view of their salutary potential for enhancing interbrand competition, would require full rule-of-reason evaluation in keeping with this Court's decision in *GTE Sylvania*.

Similarly, the state court's attempted distinction of *GTE Sylvania* as inapposite on the ground that it does not allow a state to authorize suppliers to prohibit non-designated wholesalers from buying from Oklahoma wholesalers or others than the primary source misconstrues that decision. *GTE Sylvania* makes clear that suppliers could impose territorial restrictions upon Oklahoma wholesalers, forbidding them to resell elsewhere, without any *per se* violation of the Sherman Act. Only upon proof by the rule-of-reason standard that an unreasonable restraint of trade resulted from such restrictions could an antitrust violation be found. Only the peculiarities of the Oklahoma liquor laws, which prohibit franchising by requiring sales to all Oklahoma wholesalers and permit them to resell to parties outside that state,

preclude such vertical territorial restrictions, not any federal antitrust rule. In counteracting the extraterritorial impact of the Oklahoma laws within California, the designation statute simply protects the designated wholesalers from "free riders" and allows a supplier to set up selective distribution designed to achieve the most effective interbrand competition for his brand to the same extent permitted by, but without any insulation from the reach of, the federal antitrust laws.

Unless a state statute compels private action in *per se* violation of the antitrust laws, it will not be found to conflict with or be preempted by those laws. The designation statute does not compel or authorize any violation of the Sherman Act. It merely recognizes the traditional right of suppliers to franchise wholesalers selectively. Contrary to the state court's analysis, the statute—not the supplier or any other private party—compels non-designated wholesalers to abstain from dealing with Oklahoma wholesalers or others than the primary source. That statutory requirement does not compel any private action in violation of the antitrust laws.

Even if the designation statute were assumed to violate the antitrust laws, it would not be preempted because, dealing directly with importation and the structuring of the distribution system for distilled spirits within California, it is within the state's virtually complete control. Consequently, no balancing of the state interests advanced by the designation statute with any arguably conflicting federal interest was appropriate. Moreover, in simply gratuitously equating the designation statute with the authorization of private resale price maintenance in *per se* violation of the Sherman Act and without any showing of restraint of trade, the state court, in its purported "balancing," erroneously ignored the fact that even the most restrictive vertical arrangements adopted under the designation statute could stimulate interbrand competition and would be entitled to rule-of-reason evaluation.

ARGUMENT

I

The State Court's Decision Striking Down, on Its Face, the California Designated Wholesaler/Primary Source Statute Because of Alleged Conflict with the Federal Antitrust Laws Is Patently Erroneous and Should Be Reversed.

A. The Statute Neither Requires nor Authorizes Any Violation of the Sherman Act, *Per se* or Otherwise.

Solely on the face of the statute, without examination of any evidence as to the pro-competitive purpose and consequences of wholesaler designation in the distilled spirits industry and without reliance upon any showing of adverse competitive effect,[6] the state court erroneously found that the designated wholesaler/primary source requirement of §23672 is in *per se* violation of the Sherman Act. The court held (A8-A9):

> "The designation statute gives brand owners the unfettered power to restrain competition . . . by merely deciding who may and may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine. . . .
>
> ". . . The statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturer to forbid others to sell to a disfavored importer. . . ."

As the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division concluded in

6. A2 n.1.

their brief, filed in response to the Court's invitation to express the views of the United States as to whether the petitions for *certiorari* should be granted, the decision below "holding that the California designation statute conflicts with Section 1 of the Sherman Act is plainly incorrect." In recognition that the statute requires only supplier designation of wholesalers but not territorial or other vertical restrictions, they stated (Br., p. 8):

> ". . . [T]he non-price vertical restraints that may be facilitated by California's designation statute must be judged under the 'rule of reason.' [citing *GTE Sylvania*] Only by looking at the circumstances of a particular distiller's—or all distillers'—designation of importers could it be determined whether that conduct unreasonably restrains competition in violation of the Sherman Act. Consequently, the Court of Appeal erred in holding that the designation statute, on its face, conflicts with the Sherman Act. Accordingly, the judgment below should be reversed, . . ."

That the California court was misconstruing or failing to note the patent scope of this Court's decision in *GTE Sylvania* is highlighted by its treatment of that controlling precedent (A10):

> "We find the decision in [*GTE Sylvania*] to be inapposite to the statutory provision which we consider. That case involved a manufacturer's chosen method of product distribution enforced by a refusal to sell to retailers outside of their assigned territories. Petitioners herein do not attack the decision of distillers to refuse to trade with them; rather, they attack the state provided authority of the distillers to prohibit them from trading with others. Nothing in [*GTE Sylvania*] authorizes a state to delegate such power to a private party."

This Court's rationale in *GTE Sylvania*, however, clearly was not limited to unilateral refusals to deal with purchasers who disregard a supplier's restrictions upon where or to whom they can resell. By overruling the *per se* holding of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court unequivocally re-established the proposition that vertical non-price restrictions, including agreements expressly effecting territorial confinement of distributors, require a rule-of-reason evaluation even though solely the result of the private action or agreement of those parties. Such restrictions, the Court concluded, fail to meet the "demanding standards" for invoking the *per se* rules (*i.e.*, a "pernicious effect on competition and lack of any redeeming virtue"). 433 U.S. at 50.

More specifically, in *GTE Sylvania* this Court recognized that vertical restrictions going far beyond a mere refusal to deal other than just with those franchised by or acceptable to the supplier, notwithstanding their reduction or even elimination of intrabrand competition at the level of the distributors, can enhance competition overall by stimulating the designated distributors to provide procompetitive promotional services which heighten the thrust of the supplier's products in interbrand competition with those of competing suppliers.[7] 433 U.S. at 50-59.

In short, the state court's conclusion that *GTE Sylvania* is inapposite to its determination that California's designation statute violates the Sherman Act because it delegates to private parties "the unfettered power to restrain competition" by allowing "manufacturers to forbid others to sell to a disfavored importer" squarely conflicts with

7. Interbrand competition, the Court declared, is the "primary concern of the antitrust laws" and the ultimate protection of consumers, because without it no amount of intrabrand competition can insure the availability of substitute competing products and the "significant check on the exploitation of intrabrand market power" thus provided by the existence of interbrand competition. 433 U.S. at 52 n.19.

what this Court in fact decided in *GTE Sylvania*.[8] Without any *per se* violation of the antitrust laws, suppliers in the alcoholic beverage industries could condition their sales to Oklahoma wholesalers, vertically restricting and forbidding them to resell outside that state. *GTE Sylvania* would require proof by the rule-of-reason standard that an unreasonable restaint of trade resulted from any such restriction before an antitrust violation could be found.[9] Indeed, in their brief (p. 13) opposing the petitions for *certiorari*, respondents concede that *GTE Sylvania* "may well allow a distiller to prohibit his own franchisee from reselling his brand to a third party in another state." Only the peculiarities of the Oklahoma liquor laws, therefore, but not any principle of federal antitrust law, prohibit suppliers from imposing such territorial restrictions upon Oklahoma wholesalers.

The California designation statute simply nullifies in that state the intrusion of the Oklahoma laws. In effect, by counteracting the Oklahoma prohibition upon franchising, the California legislature merely (1) preserved the freedom of suppliers recognized under the federal antitrust laws to

8. In holding that the designated wholesaler requirement of the California statute, on its face, constitutes a *per se* violation of the Sherman Act, the state tribunal ignored the teaching of this Court that before conduct can be characterized as subject to any *per se* rule "inquiry must focus on whether . . . the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

9. Supplier refusals to sell for resale outside a given area in order to avoid the disruptive effect on their marketing operations in other areas in which they maintain exclusive or selective distributorships have been sustained. See, *e.g.*, *Naify* v. *McClatchy Newspapers*, 599 F.2d 335 (9th Cir. 1979). *Cf. Dakota Wholesale Liquor, Inc.* v. *State of Minnesota*, 457 F.Supp. 480 (D. Minn. 1978), *aff'd per curiam*, 584 F.2d 847 (8th Cir. 1978) (denial of preliminary injunction).

choose California wholesalers selectively[10] and (2) protected the designated California wholesalers from unauthorized "free riders" to the same extent that the suppliers—without any arguable *per se* violation of the Sherman Act—could protect them by means of territorial restrictions on wholesalers elsewhere. The California law simply enables suppliers to establish in that state a distributional structure neither less nor more restrictive than permitted by the Sherman Act.[11]

That the California court was clearly incorrect in determining that the designation statue is in *per se* violation of the Sherman Act is supported by this Court's decision just last Term in *Grant-Billingsley Wholesale Liquor Co., Inc.* v. *Lennen*, 449 U.S. 943 (1980) (No. 80-189). Reviewing a decision of the Kansas Supreme Court[12] which upheld, on the basis of the Twenty-first Amendment and also as not repugnant to the federal antitrust laws and Constitution, a far more restrictive primary source requirement

10. See, *e.g., Schwinn, supra*, 388 U.S. at 376 (". . . A manufacturer of a product, other and equivalent brands of which are readily available in the market, may select his customers, and for this purpose he may franchise certain dealers to whom alone he will sell his goods . . .").

11. The California court's statements, repeated throughout its opinion, that §23672 gives to suppliers or brand owners an unfettered or unqualified power to restrain trade and that their decisions are "final" disregard the availability of federal antitrust suits. Neither the California statute nor the primary source requirements of most of the other states even purport to immunize selective wholesaler designation or franchises, let alone any vertical restrictions upon resale, from the antitrust laws. If any such arrangements result in an unreasonable restraint of trade, then antitrust actions in federal court, with a full rule-of-reason evaluation, are available to private parties and government enforcement officials, just as is the case with respect to the provisions of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13) that nothing therein shall prevent sellers "from selecting their own customers in bona fide transactions not in restraint of trade. . . ."

12. *Colby Distributing Co., Inc.* v. *Lennen*, 227 Kan.2d 179, 606 P.2d 102 (1980), *appeal dismissed sub nom. Grant-Billingsley Wholesale Liquor Co., Inc.* v. *Lennen*, 449 U.S. 943 (1980).

than that of the California statute at issue here, the Court dismissed the appeal for want of a substantial federal question. While §23672 permits intrabrand competition in that a supplier is free to designate more than one wholesaler in any marketing area and the statute neither imposes nor requires any limitations upon the territory served by any wholesaler, the Kansas statute, in addition to providing that no wholesaler is to sell a brand other than pursuant to a written agreement with the supplier, also prohibits all intraband competition between wholesalers. The Kansas statute mandates that the territory within which the designated wholesaler is authorized to sell is to be specified and that no supplier can "grant a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory." Kan. Stats. Ann., §§41-101, *et seq.*

On appeal to this Court, the parties challenging the Kansas statute urged, as they had before the state courts, that its delegation of authority to private parties to establish exclusive, territorially confined distributorships was in *per se* violation of the Sherman Act. Those *per se* contentions were rejected by the Kansas Supreme Court. If the summary dismissal of the appeal from *Colby* for lack of a substantial federal question was not solely upon Twenty-first Amendment grounds, then this Court, too, rejected *per se* contentions of the very same character asserted by the respondents in this case and erroneously adopted by the California court.

B. Because the Statute Compels No Action by Private Parties in *Per se* Violation of the Antitrust Laws, the State Court Erred in Finding It Repugnant to the Sherman Act.

WSWA and NBWA submit that §23672 does not purport to authorize or mandate any violation of the Sherman Act. Without exception, the decisions of this Court establish that

in order to find a state statute repugnant to the antitrust laws it must compel action by private parties which is a *per se* or other clear violation. In another case involving a challenge to state liquor regulations based upon alleged Sherman Act grounds, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45 (1966), this Court declared:

> "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446. We find no such clear conflict in the present case. . . . [The state regulation] imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of [the state regulation]."

By contrast, in the recent case of *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court upheld a line of California state court decisions[13] striking down California's price posting requirements for wine and spirits. Those decisions, however, involved California's total delegation to private parties of the unsupervised power to set minimum resale prices to be charged by the purchasers of their brands. Such vertical price-fixing, lacking even the pretense of state review or involvement, constituted a *per se* violation of the Sherman Act on the face of the statutes and without more.

The designation statute, contrary to the requisites for finding conflict with the antitrust laws, wholly fails to compel any private action in *per se* violation of the antitrust laws. Indeed, as the Solicitor and Assistant Attorney Gen-

13. See *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978); *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Board*, 87 Cal. App.3d 996, 151 Cal. Rptr. 492 (1979); *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App.3d 979, 153 Cal. Rptr. 757 (1979).

eral noted (Br., pp. 12-14), "... contrary to the conclusion of the Court of Appeal . . . , the primary thrust of the designation statute merely is to recognize the inherent right of *any* manufacturer to select or franchise wholesalers through whom its products will be sold or distributed." Recognizing that not even those territorial restraints which can be found to violate the Sherman Act only upon a full rule-of-reason evaluation are required by the statute, they concluded:

> "Because the designation statute does not require a brand owner to impose vertical restraints of a kind that may violate the Sherman Act, the fact that a particular brand owner might abuse its powers in imposing such restraints (and might rely on the designation statute to police them) is not a basis for invalidating the statute on its face. . . .
>
> "Thus, because the designation statute, unlike the resale price maintenance statute involved in *Midcal*, does not compel the conduct that is asserted in this case to be in violation of the Sherman Act, the Court of Appeal erred for this reason alone in holding that the designation statute on its face conflicts with the Sherman Act. . . ."

Similarly, the state court's characterizations that in effect the "statute gives one private party [the supplier] the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller" and "allows the manufacturer to forbid others to sell to a disfavored importer" do not square with what in fact the statute compels. All that the statute requires of a supplier who wishes to have his brand qualify for importation into California is his designation of one or more wholesalers, whether ten, twenty or each and every wholesaler licensed by the state. The statute merely recognizes the right universally enjoyed by suppliers (ab-

sent statutes such as those in Oklahoma and Minnesota) to elect with whom they will deal. The supplier does not forbid any California or Oklahoma wholesalers to deal with each other. Rather it is the legislature and the statute itself which forbid such dealing, and that statutory compulsion upon unauthorized California wholesalers simply does not compel the kind of action by private parties which violates the Sherman Act.

Unless overturned, the much-publicized and erroneous decision by the California court may have substantial, far-reaching precedential impact elsewhere in view of the similar designated wholesaler and primary source laws which exist in a majority of the license states.[14] Based upon the incorrect application by the California court of principles of federal antitrust law, pre-emption and supremacy, the primary source requirements of other states have been challenged in pending litigation and the filing of additional suits asserting the same claims and raising the same issues is likely unless the Court repudiates the erroneous rationale of the decision below.[15]

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14. In their brief (p. 20 n.18), the Solicitor and Assistant Attorney General express their belief that the opinion below does not call into question the primary source laws in other states which require an in-state wholesaler to purchase directly from the distiller inasmuch as the wholesaler designation statutes, such as California's, do not require the authorized wholesaler to "purchase the brand only from the distiller, as would be the case under a primary source law." *Amici* submit, however, that in purpose and practical effect the two types of statute are so essentially alike that the erroneous rationale of the court below could be applied to either by a state court mistakenly adopting it. A primary source law gives brand owners just as much "power to tell an [unauthorized but licensed in-state wholesaler] that he may not buy from an independent licensed Oklahoma seller" as does a designation statute.

15. *H&H Distributing Company, Inc.* v. *Mississippi State Tax Commission, et al.*, Civil No. J80-0323 (N), S.D. Miss. (Jackson Div.); *Mile Hi Wholesale Liquors, Inc.* v. *Alan Charnes, Executive Director of the Department of Revenue, State of Colorado*, Case No. 80 C.V. 8844, Dist. Ct., City & County of Denver, State of Colorado.

II

Even if in Violation of the Antitrust Laws, the Designation Statute Was a Valid Exercise of California's Virtually Complete Control Under the Twenty-First Amendment of the Importation and Structuring of the Distribution System for Intoxicating Beverages.

The decision below also disregards the long-standing construction of the extent of the power granted to the states by the Twenty-first Amendment to control the importation and structuring of the distribution of intoxicating beverages within their borders. Even if the California and other designated wholesaler or primary source laws violated the Sherman Act, as the state court mistakenly concluded, any claim of federal pre-emption would fail because of that broad power. Section 2 of the Amendment provides that "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The California court rejected the applicability of the Amendment without analysis other than its *ipse dixit* that "the designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution." Concluding instead that the state's interests, allegedly in conflict with the competitive objectives of the Sherman Act, were of the type which, "like the price maintenance laws," must be reconciled with those federal interests (A12), the court applied its own mistaken balancing test and found the state interests lacking. This determination is wholly at odds with the long line of Twenty-first Amendment decisions of this Court, including *Midcal, supra.*

From its adoption, the Twenty-first Amendment has been accorded a broad sweep by this Court. Particularly germane are several decisions which demonstrate that the

designation statute falls within the state's virtually complete control over importation and structuring of the distribution system and, therefore, unlike any delegation of private price-fixing authority, requires no balancing with any conflicting federal interest even if such an opposing interest were assumed to exist on the facts of this case. Dir tly contrary to the conclusions of the court below, for example, is the characterization by Justice Brandeis in *State Board* v. *Young's Market Co.*, 299 U.S. 59, 63 (1936), "Can it be doubted that a State might . . . channelize desired importations by confining them to a single consignee?" As Justice Black stated in his dissenting opinion in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 339 (1964):

> ". . . [T]his Court in *State Board* v. *Young's Market Co.* . . . said that a State is perfectly free to set up a state liquor monopoly or to confer a liquor monopoly upon some one dealer in the State. It is equally obvious that New York is free to allow only a limited number of dealers to engage in the liquor business. It might do this because it wanted to discourage consumption, or to make it easier to police the liquor traffic, or to accomplish some other objective the State thought worthwhile to protect against the evils which can flow from the traffic. In particular, New York might want to see that sales are not diverted to Idlewild from other dealers licensed and regulated by the State."

Based upon the Twenty-first Amendment, in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972), the Court sustained a South Carolina requirement that producers could ship alcoholic beverages into that state only to an employee located there. The Court held that the requirement that the sales be localized in South Carolina was an appropriate exercise of the state's power under the Twenty-first Amendment and was not merely a subterfuge to subject out-of-state sellers to taxation contrary to the

provisions of 15 U.S.C. §381. Reiterating that "by virtue of [the provisions of the Twenty-first Amendment] a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distrubtion or consumption within its borders" (409 U.S. at 283), the Court concluded that the South Carolina requirement did not violate the Commerce Clause. Just as the designated wholesaler or primary source requirements in California and elsewhere are part of overall, complex and integrated regulatory schemes of similar character, the South Carolina local sale requirement was evaluated by the Court as an integral part of the total regulatory structure of that state:

> "South Carolina's Alcoholic Beverage Control Act is a long and detailed statute. Requirements that certain records be kept by the manufacturer, the wholesaler and the retailer pervade the scheme. There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records. . . .
>
> "The requirement that before engaging in the liquor business in South Carolina a manufacturer do more than merely solicit sales there is an appropriate element in the State's system of regulating the sale of liquor. . . ." 409 U.S. at 282-283.

By analogy, California should be free to require purchases only from the primary source suppliers accountable to the state and to exclude sales by Oklahoma wholesalers not subject to the same responsibilities and controls.

More recently, in *Midcal*, this Court reiterated that "the Twenty-first Amendment grants the State virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."

Other types of alcoholic beverage regulation, while substantially within the discretion of the states, may be subject to the commerce power in appropriate situations, and then a balancing of the competing state and federal interests becomes necessary in evaluating such regulations.[16] Thus, while the federal government retains some Commerce Clause authority over intoxicating beverages, as this Court's decisions demonstrate, restrictions upon importation and the structuring of their distribution systems are a matter of "virtually complete control" by the states.

Even as to those regulations directed to matters other than importation and the structuring of the distribution system and which require a balancing of any conflicting federal interests, the extent to which the authority granted to the states by the Twenty-first Amendment must be weighed in favor of such regulations is delineated by *Midcal*, was disregarded by the court below, and places its decision in sharp conflict with *Midcal* and the earlier decisions of this Court.

The clear federal interest at issue in *Midcal* was price competition and the *per se* outlawing of private vertical price-fixing—an interest of paramount importance to the competitive objectives of the Sherman Act and involving conduct determined to be without justification or defense because of its "pernicious effect on competition and lack of any redeeming virtue." This prime federal competitive goal was opposed only by California's claimed interest in temperance and the preservation of small retailers against their larger competitors. In *Midcal*, however, California had "shown less than an enthusiastic interest in its wine pricing system" (445 U.S. at 111 n.12), and there were

16. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" 445 U.S. at 110.

evidence and findings both by California's administrative agency responsible for alcoholic beverage control and by its courts that in fact the asserted state interests were not advanced by resale price-fixing. Emphasizing the importance of preserving the regulatory power granted to the states, this Court noted that "the findings and conclusions of [the California] courts are not binding on this Court to the extent they undercut state rights guaranteed by the Twenty-first Amendment." Nevertheless, on the record there was no basis for disagreeing with the California courts' conclusions, which were reasonable and supported by the only evidence of record:

> "... Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians."

With no basis for supporting the claimed state interests, therefore, this Court ruled that the "unsubstantiated state concerns put forth in this case simply are not of the same stature as the goals of the Sherman Act" and "the Twenty-first Amendment provides no shelter for the violation of the Sherman Act by the State's wine pricing program." 445 U.S. 111-114.

The implication of the *Midcal* analysis is that, even where vertical price-fixing was the subject of regulation rather than importation and structuring of the distribution system, this Court would not be bound by state court findings undermining the state's "substantial discretion" under the Twenty-first Amendment unless the record was devoid of any basis for sustaining the state's interests and power. Unlike the conclusions based upon uncontradicted evidence of record in *Midcal*, here the court below decided solely upon the face of the statute and without reliance upon any evidentiary showing that the designated statute failed to serve legitimate interests in California.

In conflict with the rationale set forth in *Midcal,* and even though a regulation more clearly directed to importation and structuring of the distribution system than the California designation statute would be difficult to conceive, the court below expressly rejected the contention that the California designated wholesaler/primary source statute "is within the state's virtual complete control over whether to permit importation or sale of liquor and how to structure the distribution system." On that erroneous predicate, purporting then to balance the allegedly competing state and federal interests, the California court, with no analysis other than its equating the wholesaler designation statute with "the price maintenance laws" previously overturned, initially placed upon the federal tray of the scale a conclusion defying any possible counter-weight: "The grant of power to a private party to prohibit interstate commerce between other private parties and to limit competition in the California wholesale market results in a complete undermining of the federal policies embodied in the Sherman Act." Understandably, thereafter, the court totally dismissed any state interests "purportedly served by the designation statute," including facilitating the monitoring and tracing of distilled spirits, aid in the collection of excise taxes, maintenance of the three-tier system of distribution, and preserving the competitive viability of small retailers. A12-A14.

Even if it were assumed that §23672 somehow violates the Sherman Act, it is clear, for the reasons discussed in the preceding section of this brief and analyzed by this Court in *GTE Sylvania,* that even the most restrictive vertical arrangements any supplier could adopt under the aegis of that statute might stimulate trade and commerce by promoting vigorous interbrand competition. There can be no reasoned basis, therefore, for the lower court's conclusion, without benefit of any evidentiary showing, that the designation statute completely undermines the federal policies of the Sherman Act or that it fails to vindicate the legitimate state interests dismissed by the court.

In its dismissal of the appeal from the Kansas Supreme Court's decision in the *Colby* case for want of a substantial federal question, this Court presumably concluded either that the far more restrictive primary source statute there did not violate the Sherman Act or that the Twenty-first Amendment reserves to the states the power to enact such regulations. While the absence of any basis for the Sherman Act claims there or here seems so apparent, if this Court dismissed the appeal in *Colby* on Twenty-first Amendment grounds, then the decision below presumably conflicts with the view of the Amendment applied by this Court in reviewing that case.

Conclusion

For the reasons stated, the judgment below should be reversed.

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